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Acknowledgments

These guidelines explaining federal and state pupil nondiscrimination requirements in interscholastic athletics are the result of extensive collaboration between the Wisconsin Department of Public Instruction (DPI) and the Wisconsin Interscholastic Athletic Association (WIAA). It is the intent of both of these organizations that the guidelines help Wisconsin's public schools provide equitable and enjoyable opportunities in sports for our children and youth.

This guide is designed to help schools fully implement Wisconsin's pupil nondiscrimination guidelines (section 118.13, Wis. Stats. and the administrative rules contained in PI 9). The guidelines draw heavily on case law related to Title IX of the federal Educational Amendments of 1972, which first codified sex equity requirements in public schools, and on subsequent rulings and interpretations by the U.S. Department of Education, Office of Civil Rights (OCR).

In 1990, we initiated two invitational discussions titled *Equity in Band/Cheer/Pom: Finding Solutions* in order to begin resolving the logistical difficulties of providing equitable pep band, cheerleader, and pompon support for comparable girls' and boys' sports. We greatly appreciate the assistance provided by representatives of the Association of Wisconsin School Administrators, Wisconsin Association of Cheer/Pompon Coaches, the Wisconsin Athletic Directors Association, and the Wisconsin School Music Association (especially the band directors). Because of the lack of guiding case law and the great difference in size of Wisconsin's schools, finding a uniform solution was impossible. In our experience, public schools in Wisconsin have made great strides in providing these services equitably.

In the 1997 edition, we add two pull-out supplements: 1) Prevention of Harassment, Hazing, and Assault (Appendix I), and 2) Information for Parents and Guardians (Appendix K). We have developed Appendix I in response to increased attention to and concern about sexual harassment and hazing in athletics and public schools in general. The information provided is intended to prevent incidents of harassment, hazing, or assault. The supplement for parents and guardians (Appendix K) is designed to answer the questions most often asked about equity and athletics. The questions and answers in these guidelines and supplements are intended to provide general information and do not constitute legal opinions. What the law may require will depend upon the specific circumstances in each case. We encourage you to copy and disseminate these two supplements, as well as any other sections of this publication.

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Overview

Discrimination in interscholastic athletics in Wisconsin has been an item of increasing concern since the 1970-71 school year, when swimming, gymnastics, and track for girls were given state tournament status by the Wisconsin Interscholastic Athletic Association (WIAA). Additional girls' sports were added to the WIAA list each year until the number totaled ten in 1982-83. As of 1997, the state interscholastic program includes ten sports for girls and 11 sports for boys. In addition, the State Association regulates Boys Volleyball competition but does not provide a tournament series (presently only 32 of the WIAA member schools sponsor Boys Volleyball).

The growth of girls' sports in Wisconsin coincided with the passage of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded educational programs. Title IX gave needed impetus for the development of girls' interscholastic sports and expanded opportunities in all educational programs and activities.

Although discrimination exists in many forms, most discrimination problems in interscholastic athletics have been based historically on sex. In the 1997 edition of the guidelines, we begin to address other discriminatory factors, but will continue to draw on the bulk of case law and interpretations by the Office for Civil Rights, which focus on sex or gender.

In the years since 1972, nearly all Wisconsin school districts have experienced some problems in providing equity between the boys' established programs and the girls' growing programs. Problems frequently encountered included developing equitable budgets, sharing facilities, providing comparable facilities, transporting athletes, and scheduling games. Other problems arose in providing publicity, assigning bands and cheerleaders to games, and maintaining consistent athletic codes.

Most of the problems at the school-district level have been settled by enlightened leadership and compromise, but it is not unusual for controversies to result in complaints, frequently through the federal Office for Civil Rights or litigation through the courts.

At the state level, it has been necessary for WIAA to change long-standing rules. For example, WIAA rules prohibited all competition between boys and girls. In 1978, the U.S. District Court ruled that qualified girls must be allowed to participate on boys' teams if no girls' team is offered in a sport. This decision, which applies to both contact and noncontact sports, is consistent with other court decisions throughout the country. As a result of this ruling, the WIAA changed its rule.

A number of sex-related athletic problems have yet to be resolved. Equal offerings of some WIAA sports to girls and boys during fall, winter, and spring seasons, reaching agreement at local and conference levels regarding the scheduling of activities on given days of the week, and providing equitable media coverage for boys' and girls' activities are problems that remain to be fully solved.

Although in 1984, the U.S. Supreme Court (in *Grove City College v. Bell*, 465 U.S. 555, 1984) cast serious doubts about the applicability of Title IX to programs such as athletics that receive no direct federal funds, the Civil Rights Restoration Act of 1988 has clarified this point and established that Title IX applies to all programs and activities.

In 1992, the United States Supreme Court decided that monetary damages may be awarded for sexual harassment under Title IX (*Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 1992). This decision has caused school districts to approach questions of gender equity with a greater sense of urgency, and to focus on the issue of sexual harassment in interscholastic athletics. To address this emerging and important issue, we have included the appendix section on preventing harassment, hazing, and assault (Appendix K).

In 1985, the Wisconsin Legislature repealed and recreated section 118.13, Wis. Stats., which prohibits discrimination in public schools on the basis of sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability. Section 118.13(2), Wis. Stats., requires school boards to develop policies and procedures, including a complaint procedure, to implement the statute (see *Pupil Nondiscrimination Guidelines*, DPI Bulletin No. 94050). Section 118.13, Wis. Stats., also requires that the state superintendent decide appeals of the school districts' final decisions on complaints. The statute also

authorizes the state superintendent to review school district compliance with the statute and provide school districts with technical assistance.

The issue of whether some mascots, logos, and nicknames used by school athletic teams are discriminatory and offensive began to be widely debated in the press and other public forums in 1991. Some districts and the department received complaints about discriminatory logos and mascots. In 1992, the state superintendent requested an opinion from the Attorney General on the subject of whether American Indian logos, mascots, and nicknames come within the purview of the pupil nondiscrimination statute and its rule. The opinion is straightforward and clear, stating that the use of such logos, mascots, and nicknames is clearly within the purview of the law. Further, the Attorney General found that the administrative rules in PI 9, Wis. Admin. Code, which define the statutory language "discrimination," "pupil harassment," and "stereotyping" are a valid interpretation of the statute. Evaluations of whether a particular use by a school district of an American Indian logo, mascot, or nickname is discriminatory must be made on an individual, case-by-case basis. Discrimination which meets the definitions of either stereotyping or pupil harassment must be shown to be detrimental to constitute a violation of the law. Finally, it is not a necessary element of a finding of discrimination to prove that the district intended to discriminate by adopting such logos or mascots.

School districts using mascots, logos, and nicknames which have single gender or ethnic group connotations could be in violation of s. 118.13 and PI 9. In 1994, the state superintendent urged school districts to review their logos and mascots in light of the Attorney General's opinion to determine whether a change was in order.

The Department of Public Instruction and the WIAA have prepared this publication to provide guidelines for athletic decision makers at the local and conference levels. The guidelines are based upon the spirit and regulations of Title IX, appropriate case law, WIAA rules, section 118.13, Wis. Stats., and PI 9, Wis. Admin. Code, in addition to valuable assistance from professional organizations and the U.S. Office for Civil Rights.

Although most attention will focus on sex equity, other areas of possible discrimination that are prohibited under section 118.13, Wis. Stats., will also be discussed. It is intended that these guidelines will help ensure the following:

- No student's athletic participation is to be determined by any of the discriminatory factors listed in section 118.13, Wis. Stats, although the Americans with Disabilities Act has been interpreted to mean that it is not necessary to alter the standard of an activity to give an unfair advantage to opponents in athletic contests.
- Since separate interscholastic athletic programs are conducted for boys and girls, both programs are to be provided with comparable facilities, equipment, coaching, game and practice schedules, training rules, awards, and publicity.
- The levels of competition provided for boys and girls are to be commensurate with student interests and abilities.
- Activities peripheral to the athletic program, such as pompon squads, cheerleaders, and pep bands, are to be assigned to specific games on the basis of a school plan that does not include sex of either athletes or support activity participants as a factor.
- Administrators, coaches, parents, and athletes will understand both the legal and philosophical implications of discrimination in athletics.

Philosophy

The intent of most civil rights legislation is to ensure equitable treatment for minority groups and individuals who have been subject to discrimination. In Wisconsin, the Legislature enacted section 118.13, Wis. Stats., in an attempt to prevent discrimination in public schools on the basis of sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability.

This statute can significantly enhance interscholastic athletic participation, an important component of education for thousands of boys and girls in Wisconsin. However, ensuring equity in athletics, particularly sex equity, is frequently hindered by stereotypic beliefs about what constitutes safe, appropriate, and acceptable athletic participation for boys and girls. The previously held supposition that only males should be involved in vigorous, competitive sports, often involving physical contact, has lessened, but not to the extent that girls' athletics have achieved a desired level of equity or equality of opportunity.

The spirit and intent of the statute, as it applies to interscholastic athletics, is to provide all boys and girls with the opportunity to participate in equitable athletic programs and activities at comparable levels of support. Nothing in section 118.13, Wis. Stats., or in Title IX, for that matter, requires comparable programs for males and females in athletics.

Both DPI and the WIAA are committed to the concept of separate athletic programs for boys and girls. On the surface, this seems to contradict civil rights decisions in which courts have consistently held that "separate but equal" is in fact unequal. In athletics, however, size, strength, and weight are often the qualifying factors for successful participation, and these factors continue to favor the average boy over the average girl. Consequently, if all sports activities were open equally to both boys and girls, the number of female athletes would be severely curtailed.

The best interests of both boys and girls in athletics seem to be served at this time by separate, comprehensive, comparable programs that are carefully organized and monitored to accommodate the interests and activities of both sexes. Comparable programs, according to DPI/WIAA philosophy, are those offering boys and girls the same or similar activities, with opportunities and resources of equal quality in the areas of coaching, provision of facilities and equipment, assignment of practice and game times, awards, publicity, and transportation. Cheerleaders, pompon squads, and pep bands have individual identities and add to the excitement and attractiveness of high school sports. Appearances at respective boys' and girls' contests must satisfy the same equity comparability standards as those just mentioned. The availability of concessions stands, booster activities, and so forth, cannot be ignored either.

In the matter of boys competing on girls' teams and girls competing on boys' teams, Title IX requirements and subsequent case law generally allow students to cross over only if there is no team for one sex and athletic opportunities for that sex have been limited in the past. In Wisconsin and many other states, this approach allows girls on boys' teams under certain conditions, but it does not allow boys on girls' teams. DPI/WIAA philosophy tolerates the apparent unfairness to boys in this situation only because the alternative would be more discriminatory. Both agencies monitor related state and federal case law on an ongoing basis. Future court findings will influence interpretations and determinations on this issue.

Athletic programs most successfully reflect the philosophy of equity when the people affected develop plans and policies. Typically, this includes school administrators, athletic directors, coaches, athletes, parents, and representatives of groups that perform at athletic contests. It is especially

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¹As distinct from participation in physical education classes.

important to ensure adequate representation of both females and males in planning equitable athletic programs in Wisconsin.

Although most athletic equity problems should be prevented or solved at the district level, it should be emphasized that equity is guaranteed at several levels. Among the sources to be considered are the Fourteenth Amendment to the U.S. Constitution (equal protection), Title IX of the Education Amendments of 1972, the Wisconsin Constitution, section 118.13, Wis. Stats., PI 9, Wis. Admin. Code and the bylaws and rules of eligibility of the WIAA.

DPI and the WIAA are confident in the ability of educational decision makers to guarantee equitable athletic opportunities for all boys and girls in Wisconsin. This is consistent with the Wisconsin tradition of educational excellence and ensures no students are denied participation in activities for discriminatory reasons. WIAA member schools have successfully identified ways to provide greater levels of access to interscholastic athletic programs, and, more important, to afford all public school students with the opportunity to benefit from participation in athletics. A positive approach must continue if Wisconsin's sports offerings are to withstand the scrutiny of critical observers, and, more importantly, to afford all public school students the opportunity to benefit from participation in athletics.

Pupil Nondiscrimination Law

(Section 118.13, Wis. Stats.)

- **118.13 Pupil discrimination prohibited. (1)** No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational, or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability.
- (2) (a) Each school board shall develop written policies and procedures to implement this section and submit them to the state superintendent as a part of its 1986 annual report under s. 120.18. The policies and procedures shall provide for receiving and investigating complaints by residents of the school district regarding possible violations of this section, for making determinations as to whether this section has been violated and for ensuring compliance with this section.
- (b) Any person who receives a negative determination under par. (a) may appeal the determination to the state superintendent.
 - (3) (a) The state superintendent shall:
 - 1. Decide appeals made to him or her under sub. (2)(b). Decisions of the state superintendent under this subdivision are subject to judicial review under ch. 227.
 - 2. Promulgate rules necessary to implement and administer this section.
 - 3. Include in the department's biennial report under s. 15.04(1)(d) information on the status of school district compliance with this section and school district progress toward providing reasonable equality of educational opportunity for all pupils in this state.
 - (b) The state superintendent may:
 - 1. Periodically review school district programs, activities, and services to determine whether the school boards are complying with this section.
 - 2. Assist school boards to comply with this section by providing information and technical assistance upon request.
- (4) Any public school official, employe, or teacher who intentionally engages in conduct which discriminates against a person or causes a person to be denied rights, benefits, or privileges, in violation of sub. (1), may be required to forfeit not more than \$1,000.

Section note: Ch. 418 s. 929 (55)(a), Laws of 1977; 1983 Acts 374, 412; 1985 Act 29; 1987 Act 332; 1987 Act 332 s. 66a provides that sub. (4) takes effect July 1, 1989; 1985 Act 29 s. 3043(1) provides that the state superintendent shall submit the rules required under s. 118.13(3) (a) 2 in final form no later than July 1, 1986; 1991 Act 31 amends 118.13(1) by the addition of religion to the protected groups.

Administrative Rule

PI 9.01 Discrimination Prohibited. This chapter establishes procedures for compliance with s. 118.13, Stats., which provides that no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational, or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability. This chapter does not intend to prohibit the provision of special programs or services based on objective standards of individual need or performance to meet the needs of pupils, including gifted and talented, special education, school age parents, bilingual bicultural, at risk and other special programs; or programs designed to overcome the effects of past discrimination.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

PI 9.02 Definitions. In this chapter:

- (1) "Bias" means an inclination for or against a person or group of persons based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability, that inhibits impartial or objective judgment affecting pupils.
 - (2) "Board" means the school board in charge of the public schools of a district.
- (3) "Curricular program or activity" means a particular course or courses of study within the scope of the curriculum.
 - (4) "Department" means the Wisconsin department of public instruction.
- (5) "Discrimination" means any action, policy, or practice, including bias, stereotyping, and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles, or rewards based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability, or which perpetuates the effects of past discrimination.
- (6) "Extracurricular program or activity" means an activity not falling within the scope of the curriculum and includes all organized pupils' activities which are approved or sponsored by the school board whether on or off school property.
 - (7) "National origin" includes pupils whose dominant language is other than English.
 - (8) "Pregnancy" includes any pregnancy-related condition.
- (9) "Pupil harassment" means behavior toward pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile, or offensive school environment.
- (10) "Pupil services" means a program of pupil support services and activities including counseling, health and nursing, psychological, and social work services.
- (11) "Recreational program or activity" means any leisure time activity for school age children approved or sponsored by the school board and includes city recreational programs which are administered by a school board.
 - (12) "Sexual orientation" has the meaning defined in s. 111.32(13m), Stats.
- (13) "State superintendent" means the superintendent of public instruction for the state of Wisconsin.
- (14) "Stereotyping" means attributing behaviors, abilities, interests, values, and roles to a person or group of persons on the basis, in whole or in part, of their sex, race, religion, national origin,

ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

- **PI 9.03 Policies.** (1) Each board shall develop policies prohibiting discrimination against pupils. The policies shall include the following areas:
- (a) Admission to any school, class, program, or activity. This does not prohibit placing a pupil in a school, class, program, or activity based on objective standards of individual performance or need.
 - (b) Standards and rules of behavior, including pupil harassment.
 - (c) Disciplinary actions, including suspensions and expulsions.
- (d) Acceptance and administration of gifts, bequests, scholarships and other aids, benefits, or services to pupils from private agencies, organizations, or persons.
- (e) An instructional and library media materials selection policy consistent with s.121.02(1)(h), Stats., and s. PI 8.01(2)(h).
- (f) Methods, practices, and materials used for testing, evaluating, and counseling pupils. This does not prohibit the use of special testing or counseling materials or techniques to meet the individual needs of pupils.
- (g) Facilities. This does not prohibit separate locker rooms, showers, and toilets for males and females, but the separate facilities must be comparable.
- (h) Opportunity for participation in athletic programs or activities. This does not prohibit separate programs in interscholastic athletics for males and females, but the programs shall be comparable in type, scope, and support from the school district.
 - (1) School sponsored food service programs under 42 USC ss. 1751 et. seq.
- (2) Existing board policies which meet the requirements of this chapter, including those adopted by the board in compliance with federal statutes such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973, may be incorporated into the policies required under this chapter. These policies shall be included in those presented for public hearing and commentary under sub.(3).
- (3) The policies shall be adopted by the board following a public hearing or an opportunity for public commentary at a board meeting.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

PI 9.04 Complaint Procedure. Each board shall:

- (1) Designate an employe of the school district to receive complaints regarding discrimination under s. 118.13, Stats., and this chapter.
- (2) Establish a procedure for receiving and resolving complaints from residents of the school district or aggrieved persons under s. 118.13, Stats., and this chapter, including a provision for written acknowledgment within 45 days of receipt of a written complaint and a determination of the complaint within 90 days of receipt of the written complaint unless the parties agree to an extension of time; except that:
- (a) Appeals under 20 USC s. 1415 and ch. 115, Stats., relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of a child with an exceptional educational need shall be resolved through the procedures authorized by ch. 115, subch. V, Stats.
- (b) Complaints under 20 USC s. 1231e-3 and 34 CFR ss. 76.780-76.782, commonly referred to as EDGAR complaints, that the state or a subgrantee is violating a federal statute or regulation that applies to a program shall be referred directly to the state superintendent.
- (3) Notify a complainant of the right to appeal a negative determination by the school board to the state superintendent and of the procedures for making the appeal.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

Note: Included with the department's order promulgating ch. PI 9 was the following applicability statement:

The policies required under ss. PI 9.03 and 9.04 shall be developed before August 1, 1987. Complaints of discrimination received by the board prior to August 1, 1987, may be handled by any existing complaint procedures provided that the time requirements of s. PI 9.04 are met. In the absence of any board complaint procedure or if the time requirements are not met, the complainant may appeal directly to the state superintendent. Negative decisions of the board may be appealed to the state superintendent under s.PI 9.08(1)(a).

Note: Because of changes in federal law, EDGAR complaints are now IDEA complaints.

PI 9.05 Public Notice. Each board shall:

- (1) Annually provide public notice of board policies on pupil nondiscrimination including the name and address of the designated employe under s. PI 9.04(1) and the complaint procedure under s. PI 9.04(2). The notice shall be a class 1 legal notice under ch. 985, Stats.
- (2) Include a pupil nondiscrimination statement on pupil and staff handbooks, course selection handbooks, and other published materials distributed to the public describing school activities and opportunities.
 - (3) Include the complaint procedure in pupil and staff handbooks. History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.
- **PI 9.06 Evaluation.** (1)In order to provide the information necessary for the state superintendent to report on the compliance with s.118.13, Stats., as required under s.118.13(3)(a)3, Stats., each board shall evaluate the status of nondiscrimination and equality of educational opportunity in the school district at least once every five years on a schedule established by the state superintendent. The evaluation shall include the following:
 - (a) School board policies and administrative procedures.
 - (b) Enrollment trends in classes and programs.
- (c) Methods, practices, curriculum, and materials used in instruction, counseling, and pupil assessment and testing.
- (d) Trends and patterns of disciplinary actions, including suspensions, expulsions, and handling of pupil harassment.
- (e) Participation trends and patterns and school district support of athletic, extracurricular, and recreational activities.
- (f) Trends and patterns in awarding scholarships and other forms of recognition and achievement provided or administered by the school district.
 - (g) School district efforts to achieve equality of educational opportunity and nondiscrimination.
- (2) The board shall provide an opportunity for participation in the evaluation by pupils, teachers, administrators, parents, and residents of the school district.
- (3) The board shall prepare a written report of the evaluation which shall be available for examination by residents of the school district.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

PI 9.07 Reporting. Each board shall submit the following to the department:

- (1) Copies of policies and procedures under s. 118.13(2)(a), Stats., and ss. PI 9.03 and 9.04, and notices under s. PI 9.05, upon request of the state superintendent.
- (2) An annual compliance report, including the name of the designated employe under s. PI 9.04(1); and the number of complaints received during the year, a description of each complaint and its status.

Note: Included with the department's order promulgating ch. PI 9 was the following applicability statement: By August 1, 1987, boards shall submit the first annual report to the department as required under sub. (2) and provide public notice as required under s.PI 9.05.

(3) A copy of the written report of the evaluation conducted under s. PI 9.06.

Note: Form PI 1197, Compliance Report—Pupil Nondiscrimination, may be obtained from Department of Public Instruction, Division for Handicapped Children and Pupil Services, P.O. Box 7841, Madison, WI 53707.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

Note: The Division for Handicapped Children and Pupil Services is now called the Equity Mission Team.

PI 9.08 State Superintendent. (1) The state superintendent shall:

- (a) Decide appeals of board decisions made under s.118.13(2)(a), Stats., and this chapter as follows:
- 1. The complainant may appeal a negative determination of the board to the state superintendent within 30 days of the board's decision.
- 2. The complainant may appeal directly to the state superintendent if the board has not complied with the provisions of s.PI 9.04(2).
- 3. The state superintendent shall utilize the procedures under ch. PI1 to resolve appeals under this subsection.
- 4. If the state superintendent finds that the board violated s.118.13, Stats., or this chapter, the state superintendent shall issue an order to comply which includes a requirement that the board submit a corrective action plan, including a schedule, within 30 days of the board's receipt of the order.
- 5. The state superintendent shall refer a complaint to the board for resolution if it has not been filed with the board or if the complaint is currently under consideration by the board under the complaint procedure required by s.PI 9.04.
- (b) Include in the department's biennial report under s. 15.04(1)(d), Stats., information on the status of school district compliance with s. 118.13, Stats., and school district progress toward providing reasonable equality of educational opportunity and nondiscrimination for all pupils in Wisconsin.
 - (2) The state superintendent may:
 - (a) Provide technical assistance to school districts.
 - (b) Review the policies established by the board under ss. PI9.03 and 9.04.
- (c) Review school district programs, activities, and services to determine whether boards are complying with this chapter and with s. 118.13, Stats. The department may review school districts on a schedule which corresponds with the audit of compliance with school district standards under s. 121.02(2), Stats. The scheduling of reviews does not prohibit the state superintendent from conducting an inquiry into compliance with this chapter upon receipt of a complaint.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

Additional Definitions of Terms

Comparable Scope. Number of teams in specific sports, length of season, number of contests, number of coaches, levels of competition, and number of participants.

Comparable Support. Resources, equipment, supplies, cheerleaders, pompon squads, pep meetings, pep bands, mascots, booster clubs, uniforms and warm-ups, travel, food allowances, school-originated publicity, sport-specific clubs, scheduling of games, number of coaches, scheduling of practice times, medical and training facilities and services.

Comparable Type. Whether the activity is team or individually oriented, offered in the same season, and uses similar skills.

Equality. Sameness of status or competency (everybody gets the same).

Equity. Fairness and justice or impartiality; providing the resources needed to support a sport. (See the answer to question 6 in the question and answer section of these guidelines.) Beyond equal educational opportunity (which means providing the same resources, opportunity, and treatment for each student).

Interscholastic Athletics. Voluntary extracurricular activities which allow boys and girls to compete with individuals or teams from other schools in athletic contests.

Intramurals. Voluntary co-curricular activities which allow girls and boys to compete with individuals or teams within their own school in athletic contests.

Physical Education. A curriculum subject using physical activity as the primary means of teaching developmental skills, building physical fitness, informing students about the effects of exercise on the human body, and providing a repertoire of sports skills for lifetime use and for building desirable attitudes. Equity requirements for physical education are not addressed in these guidelines.

Note: The terms "co-curricular" and "extracurricular" are used interchangeably in this publication. However, when applied to pep bands, "co-curricular" may mean that playing at athletic contests is a requirement of the band elective course. "Extracurricular" may mean that playing at athletics contests is voluntary and not a requirement of the band elective course.

Meeting the Goals of Equity in Athletics

Goals	Evidence of Attainment
No student's athletic participation will be determined by any of the discriminatory factors named in section 118.13, Wis. Stats., and PI 9, Wis. Admin. Code.	 Adoption of board policy. Announcement of athletic offerings in a season including both girls' and boys' sports. Reports of positive resolutions of complaints. Comparable participation in athletics based on actual enrollment comparisons.
Separate interscholastic athletic programs for boys and girls will be provided with comparable facilities, equipment, coaching, game and practice schedules, training rules, awards, and publicity.	 Written facilities policy. Equipment inventory lists. Coaching assignments and pay schedules. Season game schedules. Written practice schedules. Athletic guidelines or codes. District news releases. Student newspapers. Reports of Booster Club activities. Coaches' job descriptions. Interviews with athletes and coaches. End-of-year/season awards.
Levels of competition provided for boys and girls will be commensurate with the interests and abilities of the students.	 Results of student interest surveys taken every two to three years. Announcements of athletic offerings in all schools. Annually updated charts showing athletic participation by grade (for previous five years).

Goals	Evidence of Attainment
Administrators, coaches, parents, and athletes will understand both the legal and philosophical implications of discrimination in athletics.	 Written record of person responsible for athletic department compliance with equity requirements. Announcements, agendas, evaluations of staff development sessions addressing equity in athletics for administrators and coaches (offered locally or through outside agencies such as DPI or WIAA). Records of speaking engagements with parents and community groups addressing athletic equity. Curriculum units that cover nondiscrimination requirements of the law. Copies of local policies on equity in athletics, as required in section 118.13, Wis. Stats., and PI 9, Wis. Admin. Code. Support by coaches for all athletes and all sports, especially comparable sports such as boys' and girls' basketball.

Questions and Answers

General questions about equity in interscholastic athletics.

The following questions and answers are intended to provide general information and guidance on questions that arise frequently. When dealing with a specific problem or question, the application and requirements of the law will depend on the particular facts.

Protected Categories

1. Is gender the only category that is protected from discrimination in athletics?

No, as in all other aspects of K-12 public schooling in Wisconsin, students are protected from discrimination and harassment on the basis of sex and on the basis of the student's race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, and physical, mental, emotional, and learning disability. Some specific rules apply in specific categories, based on federal and state court interpretations. These exceptions will be treated in some of the questions that follow.

2. Does the law apply to all school athletic programs?

The law prohibits discrimination in admission to public schools, and in any curricular activity. The law also prohibits discrimination in any extracurricular activity, pupil services, recreational program, or other program or activity, approved or sponsored by the school board. The following factors are considered in determining whether a program or activity is approved or sponsored by a school board: the provision of direct or indirect financial support; the provision of tangible resources; intangible benefits such as lending recognition or approval to a program or activity; the selectivity of the school board in providing privileges and resources to various programs and activities; and whether the relationship is occasional and temporary or permanent and long term.

Gender-Comparable Programs

3. If five programs are offered for boys and five for girls, are equity standards met?

Not necessarily. According to the rule implementing section 118.13, Wis. Stats., programs shall be comparable in type, scope, and support from the school district. If the school does not sponsor a comparable activity for girls, it cannot deny girls the chance to participate in the boys' activity. If there is interest in establishing a girls' team in a sport offered only to boys, the criteria used to initiate the boys' team should be applied to determine whether that expressed interest is sufficient for a separate girls' team.

4. Why is there a disparity between the number of athletic offerings between women and men?

In counting and listing the sports offered, certain sports which do not have girls' teams are included (for example, football, hockey, wrestling). However, girls may participate on the boys' teams in these sports. Thus, while the listing or count may show a disparity in the number of sports offered, opportunities are available for girls to participate in these sports.

Three-Pronged Test

5. What is the "test of proportionality" that we hear so much about?

Under a test originally developed by the U.S. Department of Health, Education and Welfare and continued by the Department of Education's Office for Civil Rights, which enforces Title IX, a school will be found to be in compliance with requirements for equity regardless of gender in athletic programs if it answers "yes" to any one of the following three questions:

- 1) Are interscholastic level athletic participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollments in the overall student population?
- 2) If the members of one gender have been and are underrepresented among interscholastic athletes, can the school district show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that gender?
- 3) If neither of the first two prongs may be satisfied, can an institution otherwise demonstrate that the interests and abilities of the members of that gender have been fully and effectively accommodated by the present athletic program?

Equitable Expenditures

6. Are equal expenditures required for boys' and girls' programs offered in the same season, such as football and volleyball?

Title IX of the Federal Education Amendments of 1972 does not require equal expenditures for girls' and boys' sports in the same season or even if the sports are comparable, such as girls' basketball and boys' basketball. However, the expenditures must meet the needs of the respective programs. In the case of comparable sports, the expenditures must be equitable rather than equal.

Co-Ed Access

7. A school is planning to offer golf as a sport next year. A sign-up sheet has been posted on the athletic bulletin board, and boys' and girls' names are being accepted. Is the school proceeding in a manner acceptable to the WIAA?

Article VI, Section G, of the WIAA Constitution reads as follows:

"The Board of Control shall prohibit all types of interscholastic activity involving boys and girls competing with or against each other except (a) as prescribed by state and federal law and (b) as determined by Board of Control interpretations of such law."

If there is enough interest to sponsor only a boys' team, girls may not be denied the opportunity to try out for the boys' team. If girls make the team, they must play under the boys' rules, including playing from the boys' tees, and they will also be entered in the boys' tournament series. If enough students sign up to sponsor a girls' team but not a boys' team, a girls' team may be established. However, boys will not have the opportunity to participate on the girls' team. See also, response to question 12.

Categorized Scholarships

8. Is it legal for schools to administer athletic scholarships designated for 1) one sex, 2) one race, 3) one ethnic group, 4) one religion?

Athletic scholarships are offered to graduating athletes by post-secondary institutions. Those institutions may offer the scholarships by gender to individual athletes, which follows the separation of athletics by gender. High schools may cooperate fully, subject to WIAA rules, with providing appropriate information to colleges and universities and announcing the scholarship awards. Public post-secondary institutions may not award athletic scholarships based on race, ethnicity, or religion.

Girls on Comparable Boys' Teams

9. A school sponsors both a boys' and a girls' tennis team. One very talented girl wants to compete on the boys' team instead of the girls' team. She feels the boys' team is more competitive, and she wants that experience to assist her in obtaining a major college tennis scholarship. Must the school allow this?

If the girls' tennis team has the identical opportunities (length of season, number of contests, scheduling similarities, tournament opportunities), she must be denied membership on the boys' team under WIAA rules.

Girls Playing on Boys' Teams

10. Can a female student go out for wrestling, hockey, or football and compete against other schools?

Case law has generally held that if a comparable activity is not sponsored for girls, an opportunity to make the boys' team cannot be denied, either in regular season or in tournament competition.

Pregnant Athletes

11. Can a pregnant girl be denied participation in athletics?

Federal and state statutes prohibit discrimination based on pregnancy. However, an athletic code may include pregnancy among other health-related factors that might affect eligibility for both boys and girls.

The same criteria should be used to determine whether a pregnant girl should compete as are used to determine whether a student with appendicitis should compete. A pregnant girl should be treated the same as a student who has an injury or other physical condition that might affect eligibility to participate. If no policy exists for boys' participation, then no policy should exist for girls.

Boys on Girls' Teams

12. Boys are not afforded the opportunity to play interscholastic volleyball or to participate in gymnastics within the sanctioned sports programs of the WIAA. Must a boy be allowed to participate on a girls' team?

The courts have generally held that because of past inequities in girls' sports programs it would jeopardize participation opportunities for girls to permit boys to compete on girls' teams. The U.S. Department of Education has interpreted the law to be permissive in this regard; that is, state athletic organizations may permit boys to play on girls' teams. However, the WIAA holds a philosophical position that agrees with many courts: boys, because of many more years to develop skills and strength, will in many cases take over girls' teams and girls' opportunities will be limited.

13. Why are boys not allowed to try out and compete in a traditional "girls' sport" if there is not a comparable program for boys, as girls are allowed to try out and compete in a traditional "boys' sport" if there is no comparable program for the girls?

See responses to questions 7 and 12.

Girls Pole-Vaulting

14. A school is sponsoring track and field teams for boys and for girls. One girl, however, wants to compete in the pole vault which presently in Wisconsin is a boys-only event. Should this be allowed?

Yes, the National Federation Track & Field Rule Book, which governs all interscholastic competition, lists pole vault as a girls' event. However, until Wisconsin adopts pole vault as a girls' event, any girl wanting to compete should be allowed membership on the boys' team for this event.

A student is limited to participating in a maximum of four events. Therefore, pole vault counts as one of her events and any points earned are credited to the boys' team. She then has three remaining events left for participation on the girls' team.

Girls and Weigh-Ins

15. Wrestling rules require a stripped shoulder-to-shoulder weigh-in. If girls participate, what provision must be made?

The proper procedures to use for weighing-in female wrestlers is to have a female weigh the wrestler in private. The female need not be a registered official but should be someone on the faculty of one of the participating schools. The ultimate responsibility rests with the school for which the student is wrestling. If, however, the school with the female wrestler is traveling and has assurance from the host school that a female for weighing-in will be provided, it may be handled in that fashion. If the host school cannot or does not wish to provide someone to monitor the weigh-in, it is the responsibility of the girl's school to bring a female with them to handle this responsibility.

Girls Participating on Boys' Teams

16. In what sports are girls or young women allowed to compete?

Girls are allowed to compete in any sport in which there is not a comparable athletic opportunity within the district. If a school has a girls' basketball program, a girl cannot go out for the boys' team. However, if there is a boys' basketball team and not a girls' team, any girl could then go out for the boys' team. That is why you will see girls participating in hockey, wrestling, and football.

17. If a girl participates in football, wrestling, or hockey, are any rules altered?

With the exception of the weigh-in provisions for wrestling and some handicapping conditions in certain sports, there are to be no alterations in wrestling, hockey, or football rules to accommodate any participant.

18. What happens if an opposing school refuses to provide a wrestling opponent or if a scheduled opponent refuses to wrestle a girl?

If a school refuses to provide a wrestler, or if the wrestler refuses to compete against a girl, the school forfeits that match and the girl is declared the winner.

19. A girl tries out for wrestling. The school doesn't want to have any of the boys wrestle her in practice. Is it reasonable to have the coach work out against the girl?

The coach must provide the same practice opportunities for the girls as for other team members. All athletes must participate in practice activities as directed.

20. The school sponsors a boys' cross country team but has insufficient interest to provide a girls' team. One girl has been running with the boys' team. Where will she participate in a tournament?

She will participate in the boys' series. Case law has generally held that if a comparable activity is not sponsored for girls, participation in the boys' activity cannot be denied, either in regular season or in tournament competition.

21. A school does not have a tennis, golf, swimming, or soccer team for girls. Must an interested girl be permitted to participate on the boys' teams?

The only time participation on a boys' team can be denied to a girl is when a comparable girls' team is sponsored. *Participation includes trying out and competing*.

22. Does a girl have any additional physical examination requirements or parental waiver requirements if she desires to participate in wrestling, hockey, or football?

The requirements for participation are the same for all eligible students. An additional medical documentation form or parental waiver cannot be required for a girl prior to her participation.

23. Why are softball and baseball not considered comparable sports for girls and boys, respectively?

The Supreme Court of Appeals of West Virginia ruled in favor of the plaintiff (the female student seeking opportunity) on this issue. The court noted from the record in this case that the "games of baseball and softball are not substantially equivalent" and distinguished the "superficial similarity" between the games by citing differences, including equipment, skill levels, and dimensions of the playing surface. The court concluded with the assertion that it was dealing with the case in which an opportunity is given to try out for the team. Whether particular sports are comparable depends upon the characteristics of the sports being compared.

24. A school sponsors a varsity, junior varsity, and freshman team in boys' basketball but only a varsity and junior varsity program in girls' basketball. Is this acceptable?

The criteria for offering interscholastic competition within a sport must be the same for boys and girls. It should be locally developed and include, among other factors, interest, abilities, and available competition.

The law requires comparability in sport offerings. If the scope or depth of the girls' basketball program is not comparable to the boys' basketball program because, for example, there is no girls' freshman basketball, freshman girls must be given the opportunity to play on the boys' freshman team.

Sufficient Interest

25. A girls' program in a given sport has to be offered if there is already sufficient interest, and there is already a boys' team in that sport. What constitutes sufficient interest?

The criteria used to establish boys' programs should also be used to determine whether or not there is sufficient interest to initiate a girls' program.

26. How do I start a team? For example, there is a boys' golf team and no girls' team. Furthermore, there are more boys' teams than girls'. What steps do I follow to make a proposal?

The first step is to survey your students to find out if there is a desire to participate in the particular sport you are looking to start. Once a need has been established, the next step is to present your findings to the administration and allow them a chance to study existing programs and how they will meet the needs of the newly identified sport. Due to budget constraints adding sports is very difficult; however, the law does not allow the excuse of lack of funds to stand in the way of addressing equity issues.

Team Selection And Recognition

27. How does a coach decide who gets on the team and who plays?

Each coach sets the standards for their team as well as the goals and objectives for each level within the team (varsity, junior varsity, and freshman). These standards should be communicated to parents and athletes before the season starts, thus providing everyone with knowledge of how the teams will be formed and what players and parents can expect from the coach and program. You usually see different goals and objectives at different levels within a program. How a freshman basketball team is formed and playing time established at that level is usually different from the varsity.

28. How does a coach decide who earns participation letters?

The award system for each sport is a result of an individual coach's personal philosophy or that of the school. The award system should be communicated to parents and athletes before the season starts.

Extracurricular Support For Athletics

Cheerleading

29. Is cheerleading considered a sport?

Cheerleading is not recognized by the WIAA as an interscholastic sport. It cannot be used as a factor in determining equal opportunities for athletic participation. The provision of cheerleaders at games, however, must be equitable for teams of both sexes (see Appendix A).

30. We are attempting to meet equity requirements by providing cheerleader support at both girls' and boys' athletic contests, however, girls' coaches and/or players do not want cheerleaders at their games. What can we do?

Positive communication and gradual implementation helps all parties involved to accept this as law. Concentrate on the positive aspects of 118.13 that boys have traditionally experienced. Some schools have constituted a committee with coaches, players, and cheerleaders involved in planning implementation.

31. Presently we have cheerleaders for boys' soccer in the fall. In order to comply with 118.13, Wis. Stats., we need cheerleaders for girls' soccer in the spring. This additional squad extends the season to the whole school year. What can be done?

In order to be equitable for the cheerleaders, schools must recognize that lengthening the season involves additional budget, coaching staff, and uniforms.

If budgetary constraints prohibit hiring additional cheerleading coaches or lack of student interest makes provision of cheerleaders in the spring impossible, the elimination of soccer cheerleaders would be the best alternative.

32. Our principal is interpreting "comparable sports" to mean that because we are cheering for boys' football in the fall, we now are being asked to cheer for girls' volleyball during the same season. Is his interpretation correct?

The definition of "comparable" in this document refers to sports using "similar skills." Using this definition, girls' volleyball is not comparable to football and should not require cheerleaders. In addition, volleyball does not lend itself to having cheerleaders present on the sidelines and has not historically used cheerleaders.

33. I want to provide equal opportunities for all races in our school to participate in the cheer/pompon programs. However, only Caucasian students have expressed interest in trying out. What are my responsibilities at this point?

Active recruiting with the help of students, teachers, and even community members may increase the interest level of these students. They need to know, as do all students, that they are welcome and will be treated fairly.

34. Active recruiting has sparked an interest in my cheer/pompon program by all races, however, only Caucasian students have met the skill and/or academic requirements for placement on the squad. Have I met my obligations even though no minority students were selected?

You may want to examine the possibility of pre-try-out clinics that include students of color or a special effort to recruit. In addition, you may want to assure yourself that there are no unconscious cultural barriers in the selection critiera used or in the application of the selection criteria in the try-outs.

35. Our school has only one varsity basketball cheerleading /pompon squad with one coach. How can we schedule to cover all boys' and girls' games?

Section 118.13, Wis. Stats., requires "equitable" support for comparable sports. This does not necessarily mean "total" support from cheerleaders/pompons. If your schedule traditionally had 20 games, keep the 20-game limit but split equally the coverage at girls' and boys' games. Coordination with other conference schools would be helpful to ensure consistency.

Careful consideration of any solution should take into account that cheerleaders, pompon squads, and their coaches should have a reasonable game schedule comparable to other athletes.

36. What are the requirements for bands playing at equal numbers of boys' and girls' athletic contests?

There is no requirement under s.118.13 that a pep band play at athletic contests. However, once a school decides that it wants pep bands to play at contests, the school must ensure that music support is equitable at comparable girls' and boys' games. This does not mean that the band is required to play at all boys' and all girls' basketball games, for example. In fact, this is likely to be too many nights per week for a limited number of band members to perform. The school should adopt a plan at the beginning of the school year that establishes the number of contests per season for boys' and girls' sports. Please note that the school need not provide bands for those sports that do not lend themselves to pep band performance, such as gymnastics, even if that means an imbalance of performances in that season. Support can be provided in other ways for those types of sports.

Bands

Satisfying the Need for Support

37. How should cheerleaders and bands be assigned to games to be equitable between girls' and boys' contests?

Athletic schedules should be reviewed and schedules established with an equal number of contests represented for both boys' and girls' events. If there is a problem filling out cheerleading squads or pep band numbers, districts should look into bringing up JV cheerleaders to fill in for an evening, or lower level band members to sit in for an evening to fill out the needed numbers. Basically both boys' and girls' squads should have the same number of contests represented by cheerleaders, pompon, or pep bands. However, JV cheerleaders or lower level band members should not be assigned to fill in only at boys' games or only at girls' games; they should participate in an equal number of boys' and girls' games.

Booster Clubs

38. What impact can booster clubs and related fund raising have on athletic programs?

Section 118.13 Wis. Stats., states that programs should be of the same type, scope, and support from the school district. Booster club financial contributions can affect program opportunities. School district policy on gifts must assure school control of program support, and encourage comparable support.

39. Is it appropriate to use an American Indian or other ethnic mascot, logo, or nickname?

In 1992, the Wisconsin Attorney General stated in an opinion requested by the state superintendent that "the use of American Indian mascots, logos, and nicknames could cause an American Indian harm by reinforcing a stereotype and/or creating an intimidating or offensive environment, thus perpetuating past discrimination." Under this interpretation of the law, the use of an American Indian logo, nickname, or mascot could be a violation of state law. However, the law does not presume that all American Indian logos, nicknames, or mascots are unlawful. In each case, the logo, nickname, or mascot in question (or its use) should be examined to determine whether it is offensive or negative, or creates an offensive or intimidating environment. In 1994, the state superintendent urged school districts to review their logos and mascots in light of the Attorney General's opinion and to determine if a change was in order.

School districts using mascots, logos, and nicknames which have single gender or ethnic group connotations could be in violation of s. 118.13 and PI 9.

Meeting Special Needs Of Athletes

40. My child has a disability and wants to participate in sports. What must the school do to permit her participation?

The law requires that disabled students be afforded an equal opportunity to participate in extracurricular activities, including sports. The steps, if any, the school must take to permit a disabled student to participate in a sport will depend on the specific facts of each case, including the nature of the disability and the particular sport.

41. My child is disabled and is in a special education program. Her education plan calls for participation in athletics. If she wants to play on a team, must the district place her on a team?

No. The school should take steps to provide a disabled student an equal opportunity to participate in athletics with nondisabled students to the maximum extent appropriate to the needs and abilities of the disabled student. The student may not be denied the opportunity to try out for a team, or be excluded from a team, because of her disability. However, decisions regarding the selection of team members, position played, level of participation, and playing time, all involve the exercise of judgment and a great degree of discretion by the coach.

Administrative Efforts to Equalize Athletic Opportunity

Equitable Coaching

42. The girls' swimming and diving team competing in the fall has only two coaches, but the boys' swimming and diving team competing in the winter has three coaches. Is this acceptable?

The criteria for assigning coaches to a sport should be the same for both girls and boys. It should be locally developed and include, among other factors, interest, abilities, *number of participants*, and available competition.

Comparable Funding Of Attire

43. The boys' baseball team is provided school-issued practice uniforms. The newly organized girls' softball team must provide all of their own practice attire. Is this acceptable?

No. If the boys' baseball team is provided school-issued practice uniforms, the same should be provided for the girls' softball team.

Equitable Use of Facilities

44. When a school has limited facilities for winter sports programs, is it reasonable to have the girls practice in the morning before school?

If facilities are limited and necessitate varied practice times, girls' and boys' teams should alternate practice schedules so both have equal access to the more convenient times. We advise schools to develop schedules on a seasonal basis.

Scheduling Seasons

45. Is there an accepted standard to determine the time of year when a program should be sponsored?

It is difficult to respond to this question. When the WIAA assumed responsibility for the governance of girls' athletics, a number of programs had been established and were continued in their existing calendar slot. The U.S. District Court in Montana addressed this issue in 1986 and stated that a change in seasonal placement will not facilitate the goal of maximizing participation in athletics. Because five of the ten sports sponsored for girls are offered in the fall, seasonal placement is an acknowledged concern of the WIAA and DPI and continues under study.

Conference Equity Plan Resistance

46. Our school officially wants unilaterally to enact a specific measure to achieve a greater degree of equity. The schools in the conference to which we belong wouldn't adopt a majority position enabling us to implement our desired objective. What can we do?

One way to enact a change to promote equity is to ask that the issue be placed on a conference meeting agenda. Addressing the issue in the presence of DPI and/or WIAA representatives may result in the enactment of the desired change in rules or policies. Another option is for residents of the other school districts in the conference to file complaints with the school districts. The local complaint process is discussed in question 50, below, and in appendixes B and C. Appendix D contains a sample complaint form.

Equitable Scheduling of Contests

47. Must games be scheduled so that the more favorable nights of the week are equally available to girls as they are to the boys?

Yes. Schools and conferences should take the initiative in establishing contest schedules so that girls' and boys' teams have an equal opportunity to play on nonschool nights and so that one program does not always have its games scheduled on nights followed by school days.

Equitable Facilities

48. Must locker rooms, practice facilities, competition facilities, and medical and training facilities and services be comparable for both boys and girls?

Yes. Programs offered for boys and girls should provide facilities, supplies, and equipment that are comparable in quality and availability.

Making a Complaint About Inequity in Athletics

49. What can I do if I have a complaint about inequality in athletics?

The state pupil nondiscrimination law requires that each school board adopt a written pupil nondiscrimination policy and complaint procedure. Each school board is also required to designate a school district employe to receive complaints about discrimination in school programs or activities. You

may also try to resolve any problems informally, by discussing it with coaches, teachers, supervisors, or school administrators. If you are unable to have your concerns addressed informally, you may file a complaint.

The nondiscrimination policy and complaint procedure should be made available to you upon request. To file a complaint, follow the process described in the complaint procedure. If you have gone through all the steps in the complaint procedure and are not satisfied with the outcome, you may file an appeal with DPI within 30 days. Appendix B diagrams the complaint procedure, and Appendix C is a sample written complaint procedure.

You may also file a complaint with the U.S. Department of Education, Office for Civil Rights (OCR). For this region, the OCR office is located at 111 North Canal Street, Chicago, IL 60606. The telephone number is (312) 886-8434.

50. What is the proper complaint procedure that a school should have?

There is no one proper complaint procedure or policy. There are a few points which should be considered in the development of a district complaint procedure. The complaint procedure must be written. It must provide for written acknowledgment of a complaint within 45 days of the date it is filed, and for a final written decision by the district within 90 days of the date a complaint is filed. Parents, athletes, coaches, administrators, and other interested parties should be included in the development of policies and procedures. The policies and procedures should be reviewed by the school board and communicated to parents and athletes before the beginning of each season. (Appendix B is an outline of the complaint process. Appendix C is a sample complaint procedure.)

51. I feel my child is being discriminated against, but I don't want to file a formal complaint because I am afraid of retaliation against my child. How can I get the discrimination to stop?

If you are uncomfortable reporting a problem due to concerns about retaliation, you are greatly hindered in seeking elimination of the practice. You might talk with other parents, looking for others with similar concerns. If you can find others willing to take a similar stance, it shows there may indeed be a problem administration needs to address. Another possibility would be to wait for the season to be over and then present your concerns. To do nothing allows the practice to continue.

Department of Public Instruction Responsibilities and Services

DPI Responsibilities

52. What are the state superintendent's responsibilities regarding s. 118.13, Wis. Stats.?

The state superintendent (or his/her designee) decides appeals of school board discrimination decisions. The state superintendent is required under PI 9.08(1) to submit information on the status of school district compliance with this statute to the legislature in the department's biennial report. Technical assistance may be provided to assist in complying with this statute, as a district requests.

DPI Reporting Responsibilities

53. What are the DPI's reporting responsibilities to the Legislature concerning the status of school district compliance with s. 118.13, Wis. Stats., and school district progress toward providing reasonable equality of educational opportunity and nondiscrimination for pupils in Wisconsin?

In its biennial report to the Legislature, the DPI must include information on the status of school district compliance with the statute and district progress toward providing equal educational opportunity.

Appeals to the State Superintendent

54. Can complainants appeal to the state superintendent when they feel the school board has not complied with the provisions of PI 9 and s. 118.13, Stats.?

Complainants may appeal directly to the state superintendent if the board has not complied with the provisions of PI 9.04(2) by not having a complaint procedure available or by not reaching a determination in 90 days of receipt of a written complaint.

55. What procedure does the state superintendent utilize to resolve complaints under PI 9.08(1)(a) 1 and 2? Can the state superintendent's decision be appealed?

The state superintendent is required to use the procedures under PI 1 to resolve complaints. The procedures available under PI 1 include: providing technical assistance and trying to resolve the matter informally; conducting an investigation; conducting a hearing; issuing a decision based on the record of a hearing before the local school district; issuing a protective order; arranging for mediation; directing the complainant to use the complaint process available before the school district; or determining that the state superintendent does not have jurisdiction.

If an investigation is conducted, the state superintendent will determine after the investigation is completed, whether reasonable grounds exist for believing that the matter asserted by the complainant is probably true. If the state superintendent concludes that the school district has violated s. 118.13, he or she will direct the board to comply with the law, and will give the board 30 days to submit a plan to correct the situation.

The state superintendent's final decision concerning an appeal is subject to judicial review under the provisions of ch. 227, Wis. Stats.

Complaints to the State Superintendent

56. What procedure does the state superintendent follow if he/she receives a complaint that has not been filed with the school board or if the complaint is currently under consideration by the school board?

The state superintendent shall refer a complaint back to the school board for resolution if it has not been filed with the school board or if the complaint is currently under consideration by the board. See PI 9.08(1)(a)(5), Wis. Admin. Code.

Assistance to School Districts Concerning State Law

57. What services may the state superintendent provide to school districts to assist them in achieving equity goals?

The state superintendent may provide technical assistance to school districts. This includes assistance in policy development, staff inservice, review of district procedures, and other consulting services requested by the school district. See Appendix H for DPI resource personnel.

Appendixes

- A. Providing Cheerleaders for Both Boys' and Girls' Sports
- B. School Responsibility if a Complaint is Filed Under the Pupil Nondiscrimination Law
- C. Sample Discrimination Complaint Procedure
- D. Sample Discrimination Complaint Form
- E. WIAA Comparable Sports
- F. Student Interest Surveys
- G. Sample Student Athletic Interest Form
- H. Resources
- I. Pull-out Section: Preventing Harassment, Hazing and Assault
- J. Sample Sexual Harassment Policy
- K. Pull-out Section: Information for Parents and Guardians
- L. Assessing Equity in Athletics K-12
- M. Participation in Athletic Programs: Clearing the Title IX and Equal Protection Hurdles



Early in compliance with equity statutes, one of the most frequently asked questions by a school district implementing equitable support for girls' and boys' athletic programs was "How can we provide cheerleaders for boys' and girls' basketball teams?"

This section provides possible answers to difficult organizational questions as schools implement federal and state laws that require the following:

- Cheerleading opportunities that encourage both girls and boys to try out for squads.
- Comparable support activities for comparable sports, including equipment, supplies, cheerleaders, pep band appearances, school-generated publicity, pompon squads, pep meetings, mascots, booster clubs, uniforms and warm-ups, travel, food allowances, sport-specific support clubs, scheduling of games, scheduling of practice times, medical and training facilities and services.

Concern	Possible Solutions
Very few people attend the girls' basketball games. How can we justify a separate squad for the girl's teams?	• Examine the reason for providing cheerleaders. If the primary reason is to encourage the players, cheerleaders are as helpful for girls as for boys.
	• Note that girls' and boys' basketball are often compared; since inequities in the programs are noticeable to players, coaches, and community members, the school will want to make it apparent that it values the programs equally by providing cheerleaders for both.
We have decided to provide cheerleaders for comparable boys' and girls' teams. How can we do that without creating the impression that one squad is more prestigious than another?	• Several options exist: increase the total number of cheerleaders, then rotate them at each contest so all squad members cheerlead with both teams. Have the squad cheerleading only at home games. Have two full squads and rotate them between girls' and boys' contests. A separate squad for girls' teams and boys' teams does not satisfy equity standards and is not permissible.
We want cheerleaders at both boys' and girls' contests but our cheerleaders refuse to cheer for the girls. What can we do?	 Make sure that announcements for try-outs include the statement that cheerleaders will cheer for boys' and girls' teams. Eliminate single-sex cheerleading squads.
	 Eliminate single-sex cheerleading squads. Point out that the school values the contributions of all its athletes, male and female.

Concern	Possible Solutions
We want cheerleaders at both contests but our cheerleaders refuse to cheer for the girls. What	• Note that colleges and universities have cheerleaders for both male and female teams.
an we do? (continued)	• Inform the cheerleaders the school will comply with the law and that cheering for boys' and girls' teams is a requirement of participation as a cheerleader.
	• Eliminate cheerleaders for any sport in which this problem arises.
e want boys as well as girls to try out for cerleading, but boys refuse to do it. How can	• Make sure that announcements for try-outs invite both boys and girls.
we encourage them?	• Ensure that cheerleader try-outs and performances include a variety of skills: strength, agility, grace, and so forth.
	• Note that colleges and universities have both male and female cheerleaders.

Making the Transition Easier

In order to achieve a smooth transition when implementing equitable support, we suggest that all parties involved communicate openly. Change always stimulates some resistance but a "no surprises" philosophy can go a long way toward easing resistance. The plan should not be considered final. Frequent re-evaluation and modification will make for a better, more satisfying plan for all involved.

Considerations for addressing change include the following:

- A year before implementing changes in cheer, pompon, and band programs to comply with federal
 and state statutes, meetings could occur among the athletic director, band director, and cheerleading,
 pompon, and athletic coaches. Needs and concerns for each group would be discussed. A plan for
 compliance might then be formulated over time.
- Coaches and band directors may want to get input from their groups to address their needs.
- Some schools have involved parents in informational meetings after a plan has been formulated.
- Once you have decided on a plan, take it to the school's principal for approval or revisions and to the school board when finalized.
- It is very important that try-out participants understand the new plan so that they know what will be expected of them should they become members of the cheerleading or pompon squads.
- Finally, the band director and cheerleading and pompon coaches should sit down with the athletic director and choose the contests for which they will perform, keeping all their needs in mind when scheduling.
- Cheerleading coaches may want to follow the above steps on a conference level to ensure that
 games attended will have cheerleaders from both schools represented. A good time for this would be at
 conference athletic meetings.

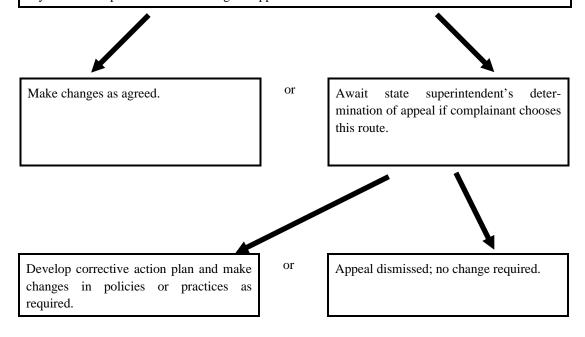
School Responsibility if a Complaint is Filed Under the Pupil Nondiscrimination Law

Reasonable attempts should be made to informally address any concern or resolve a disagreement, as quickly as possible. However, attempts at informal resolution should not be used as a device to prevent or delay the filing of a complaint. If informal resolution is not possible, the school district should follow the process outlined below.

Provide copy of local complaint procedure to complainant. Be sure complainant knows how to file complaint: complaint officer's name and address; need for written complaint; information required.

Provide written acknowledgment of a written complaint within 45 days.

- Provide school's written determination of the complaint within 90 days of acceptance of the written complaint, unless both parties agree to an extension of time.
- Inform complainant of right to appeal a negative determination to state superintendent within 30 days and of the procedures for making the appeal.



Sample Discrimination Complaint Procedure

(The following complaint procedure is offered as an example. The law does not prescribe any particular complaint procedure, the number of stages in a complaint procedure, or the progression through the stages. The complaint procedure is set by each local school board, and may involve one or several steps. The only requirements of the law are the following: the school district must designate an employe to receive complaints; the complaint procedure must be in writing and adopted by the school board; the school board must acknowledge the complaint in writing within 45 days; the final decision on the complaint must be made within 90 days and must be in writing; and the final decision must inform the complainant of the right to appeal to the state superintendent and explain the procedure for appealing.)

Gibbsville School District
S. 118.13, Wis. Stats.
Public Discrimination Complaint Procedure

If any person believes that Gibbsville School District or any part of the school organization has failed to follow the law and rules of s. 118.13, Wis. Stats., Title IX, Title VI, or in some way discriminates against pupils on the basis of sex, race, religion, color, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability, he/she may bring or send a complaint to the Administration Office at the following address: 1763 Huron Drive, Gibbsville, Wisconsin 53700. Prior to the submission of a formal written complaint, however, the district encourages resolution of complaints or concerns in an informal manner. The Gibbsville School District will take complaints, concerns, or questions about discrimination or harassment seriously and address them as quickly as possible.

Step 1 A written statement of the complaint shall be prepared by the complainant and signed. (Note: the district may have a complaint form that can be requested and which is treated as a formal written complaint when completed and submitted.) This complaint shall be presented to the district employe designated to receive complaints. That employe shall send written acknowledgment of receipt of the complaint within 45 days as required by Wis. Admin. Code PI 9.04.

Step 2 A written determination resolving the complaint shall be made by the board or its designee within 90 days of receipt of the complaint unless the parties agree to an extension of time; appeals under 20 USC s. 1415 and ch. 115, Wis. Stats., relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of a child with an exceptional educational need shall be resolved through the procedures authorized by ch. 115, subch. V, Wis. Stats.

Step 3 If a complainant wishes to appeal a negative determination by the board, he/she has the right to appeal the decision to the state superintendent within 30 days of the board's decision. In addition, the complainant may appeal directly to the state superintendent if the board has not provided written acknowledgment within 45 days of receipt of the complaint or made a determination within 90 days of receipt of the written complaint. Appeals should be addressed to: Complaint Officer, Wisconsin Department of Public Instruction, P.O. Box 7841, Madison, Wisconsin 53707. This notification is made as required by Wis. Admin. Code PI 9.04(3).

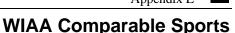
Step 4 Complaints of discrimination on the basis of sex, race, color, national origin, or disability may also be made to the U.S. Department of Education, Office for Civil Rights, 111 North Canal Street, Chicago, IL 60606.

Note: The 118.13 complaint procedure does not apply to district employes or job applicants. Also, it does not replace the federal regulations that require a school district to have Title IX and Section 504 complaint procedures. A school district may adopt a single, combined complaint procedure as long as it satisfies each of the laws that requires a procedure.



Sample Discrimination Complaint Form

Name of Person Fi	ling Complaint			Date		
Address			City		State	Zip
Telephone Home			Telephone School	or Work		
Status of person fil	ing complaint	Student Parent	Res Othe	ident er		
	race	tion on the basis of national origin physical disability religion, creed	mental disabili	ientation ity 🔲	☐ pre emotional	disability
Cidentific of comp	iani (inologo ty)	e of discrimination charg	ed and the specime i		Willion It Go	ouniou
Signature of Comp	lainant			Date Comp	laint Filed	
Signature of Perso	n Receiving Cor	nplaint		Date Recei	ved	
complaint will sig	gn and date to the state of the	omplaint investigation). The pe	rson rece	eiving the



For the purpose of making equity decisions, comparable sports are those that give boys and girls meaningful opportunities to participate in interscholastic athletics. Comparable sports provide both boys and girls with programs that involve comparable skills, season lengths, contest maximums, coach/participant ratios, support, activities, practice and contest

schedules, available transportation, supplies and equipment budget, and contest officials. Whether identical sports are offered to both boys and girls is a matter to be determined by the interests and abilities of participants.

<u>l.</u>	Girls	Boys
	Basketball	Basketball
	Cross Country	Cross Country
	Golf	Golf
	Soccer	Soccer
	Swimming	Swimming
	Tennis	Tennis
	Track & Field	Track & Field
	Volleyball	Volleyball regulated by WIAA, but tournament series not provided since at present only 32 schools sponsor it.

- II. Girls Only: Although gymnastics and softball are now recognized as sports for girls only, they may be recognized for boys if sufficient interest develops.
- III. Other: There are no girls' sports at this time comparable to football, hockey, baseball, and wrestling. Since only a few girls, statewide, have shown interest in participating in these sports, no teams for girls have been organized. However, individual girls have occasionally participated on boys' teams. There continues, therefore, to be an imbalance between girls and boys in programs offered in each season. After a thorough committee review, the WIAA Board moved to become more active in urging schools to add sports to their scheduling offerings rather than to resolve the imbalance by moving a sport from one season to another. To do so would not increase opportunities; in fact, it could very well reduce them. Suggested new programs include bowling, ice hockey, cross country, and alpine skiing. Although some schools suggested cheer and pom opportunities as offerings designed to balance boys' and girls' sports, those schools are advised that the Office for Civil Rights has not been willing to accept such programs as athletic competition.

Student Interest Surveys

One of the basic implications of the Title IX regulation and Wisconsin statutes is that sports and athletic programs must effectively accommodate the interests and abilities of all students. This standard necessitates the development and application of data collection procedures. One of the primary methods for determining the interests of students is to conduct a survey of student interests at regular intervals.

Please take a minute to think about how a student interest survey should be designed and answer the following questions:

- 1. What types of information should be included in a student survey?
- 2. What do you believe would be the outcome of a student survey conducted in your schools?
- 3. What procedures should be used for its distribution?
- 4. How frequently should student interest surveys be conducted?

Physical activity personnel need to consider what should be included in a student survey, the procedures to be used for its distribution, the frequency of student interest surveys, and the ways that the information obtained may be integrated into existing programs.

A student survey form should include the following types of information:

- Identifying information: name, grade level, and sex of student. This identifying information serves a number of important purposes, including assuring the accuracy and integrity of the survey. It is equally important that students be assured their responses will be confidential. Surveys should be designed so that the responses may not be traced back to individual respondents.
- Explanatory information: the purpose of the survey and how the information will be used.
- A system of ranking or rating specific sports activities: a listing of sports that students may rank or rate.
- Opportunity for suggesting other sports alternatives: space for listing possible interests that are not included in the listing should be provided.
- Opportunity for comments: general questions regarding attitudes or other suggestions for sports programs would be desirable.

The procedures that are followed in the distribution of a student survey may influence the outcomes. It usually is wise to ensure distribution to every student at a time when students can provide their individual responses without undue peer pressure.

Student surveys should be conducted periodically as a means of identifying current needs and the changing patterns of student interest. Determination of the frequency of student surveys should be based on the frequency of significant change in the composition of the student body, the number of times that athletic programs are designed, and the feasibility of survey efforts. Completion of surveys on a regular basis will ensure the use of current data in program planning.

Sample Student Athletic Interest Form

The purpose of this survey is to ensure that the total athletic program provides both males and females with an equal opportunity to benefit from athletic competition.

The degree of student interest or the lack of interest in athletic activities will be used to help determine what sports the district will offer. Every effort will be made to satisfy students' requests based on the interests recorded in this survey. Please note that cheerleading and pompon activities are not considered athletic activities but extracurricular activities.

Please answer each section carefully. Be sure that you rank the different sports that either you prefer to play or that you feel would satisfy your interests and abilities. One = 1, the highest rank.

School			
Grade		Date	
Gender Op	otional	Race/Ethni	city Optional
☐ Male 〔	☐ Female		
	ic offerings that I have played and will preferred; 6 is the least preferred.)	continue	to play: (Rank Order 1-6; 1 is the
	Baseball		Softball
	Basketball		Swimming
	Bowling		Tennis
	Cross Country		Track and Field
	Football		Volleyball
	Golf		Wrestling
	Gymnastics		Others:
	Hockey		
	Soccer		
Comm	ents:		

II.	Athletic offerings that I have not played the most preferred; 6 is the least prefer		to play: (Rank Order 1-6; 1 is
	Archery		Hockey
	Baseball		Soccer
	Basketball		Softball
	Bowling		Swimming
	Boxing		Tennis
	Cross Country		Track and Field
	Fencing		Volleyball
	Football		Wrestling
	Golf		Others:
	Gymnastics		
Con	nments:		
III.	The six top offerings that I am most inte	erested in playing	g:
	1	4	
	2	5	
	3	6	

IV.	What do you like most about the sports program in your school?
V.	How do you think the sports program could be improved?



Resources

Technical Assistance. When seeking clarification of the pupil nondiscrimination statute and rule, ideas for implementation, information on training, print, and audiovisual resources, or other assistance, contact the following:

Wisconsin Department of Public Instruction P.O. Box 7841 Madison, WI 53707-7841

Chet Bradley, Consultant Health Education/Physical Education (608) 266-7032

Hal Menéndez, Consultant Pupil Nondiscrimination Program (608) 267-9157

Ken Wagner, Consultant Division for Learning Support: Equity and Advocacy (608) 267-9145

Wisconsin Interscholastic Athletic Association 41 Park Ridge Drive P.O. Box 267 Stevens Point, WI 54481 (715) 344-8580

> Douglas Chickering, Executive Director Karen Kuhn, Associate Director

All persons listed above may also provide assistance with implementation and interpretation of federal laws, including Title IX of the Education Amendments of 1972. Additional assistance is available from the regional desegregation assistance center which serves Wisconsin: Programs for Educational Opportunity, #1005 University of Michigan School of Education, Ann Arbor, Michigan 48109-1259. Phone (313) 763-9910.

For assistance with interpretation, implementation, or filing complaints under federal law, contact the U.S. Department of Education, Office for Civil Rights—Region V, 111 North Canal Street, Chicago, IL 60606, (312/886-3456).

Pull-out Section on Prevention of Harassment, Hazing, and Assault

Please feel free to photocopy this document.

Acknowledgment. We thank Pat Callbeck Harper, Harper Consulting Group and former sex equity consultant for the Montana Department of Public Instruction. Pat is currently a member of the Board of Control of the Montana High School Association (high school athletics and activities). Her book, *Guidelines for Coaches, Health and Physical Educators in Preventing and Stopping Sexual Harassment in Athletics*, has provided the heart of this section. Information on how to purchase this collection of strategies, checklists, and law-related information is listed at the end of this section.

We thank as well the Programs for Educational Opportunity for some items listed in their student booklet, "Tune In To Your Rights." A full citation appears at the end of this appendix.

How to use this section. We hope that this segment can be easily copied and disseminated to coaches and others who work with students in physical activity in schools.

I. Why this section?

The Wisconsin Interscholastic Athletic Association and the Department of Public Instruction feel strongly that harassment of any sort has no place in public education, including the classroom or in extracurricular activities. Both of these organizations are pledged to support federal and state law which prohibits this type of behavior.

We have seen an enormous increase in the number of calls the Department of Public Instruction and WIAA have received concerning these issues. Incidents of hazing and harassment have become more prevalent in all aspects of U.S. society, from domestic violence to date rape, from physical abuse of officials in professional sports to taunting during school contests. In addition, recent court cases addressing sexual harassment in schools have held educators responsible for staff-to-student and student-to-student incidents. Schools have paid sums in the hundreds of thousands of dollars to complainants who alleged that administrators did not stop abuse and harassment. We believe that coaches and others who work with student athletes need to be aware of rapidly changing conditions and expectations. They also need to know what to do to prevent and intervene in hazing, harassment and abuse.

Pat Callbeck Harper (1995) mentions the following factors that could place coaches and others in athletics at risk:

- high physical contact is prevalent, often combined with times of low supervision;
- locker rooms are 'risky climates'—undressing, showers, opportunities for sexual hazing;
- the very nature of physical instruction requires TOUCH;
- travel sets up 'risky situations';
- team members may be more likely to harass others, other teams, own members;
- programs use large numbers of volunteers, younger, and inexperienced staff.

To these, we add:

• For many years, men and boys dominated athletics. Even though public schools have been required to offer athletic opportunities for girls since 1972 under Title IX, some residual resentment may linger. Having to share the spotlight may make some people uncomfortable.

- Sexual harassment and assault is an expression of dominance and 'power over,' not sexual attraction. Some may use harassment and assault against women and girls to show that they are threatened by the presence of people who were not active in athletics when they were growing up.
- Harassment, hazing, or assault inflicted upon a student by persons of the same sex may also constitute prohibited sexual harassment.
- Male athletes were, and are, often motivated by coaches who encourage them not to be weak, and use females as an example of weakness. This results in objectification of, disrespect and disregard for girls and women through name-calling, bullying, discrimination, and harassment or hazing.
- Every aspect of U.S. society is becoming more diverse. This diversity in public education is a welcome addition. Students need to know how to get along with males and females of all races and ethnicities, sexual orientations, religions, and abilities. Acceptance, tolerance, and affirmation of difference can only help them in their educational experiences and in their life's work. Interscholastic athletics is an opportunity to meet diverse athletes and accept them.
- Athletes respect and imitate their coaches. While most coaches are wonderful role models, some coaches may exhibit outdated, irrelevant, and even illegal behaviors. Coaches need to know that times, expectations, and the law have changed.
- We emphasize: recent court cases have found educators negligent when they knew or should have known of students' harassment of other students. In some cases, school employees or district insurance companies have paid large sums of money. Coaches need to know their responsibilities in preventing harassment and assault.

II. Statutes and administrative rules that prohibit harassment and hazing in schools.

A. What are we talking about: Legal definitions

Federal guidelines for the prevention of sexual harassment were first published for the workplace by the Equal Employment Opportunities Commission in 1980. The courts have explained and further defined the guidelines since that time. In 1981, the Secretary of the Department of Education issued a memorandum which states that Title IX may cover sexual harassment as well.

In March, 1997, the Office for Civil Rights issued its final policy guidance on sexual harassment in public schools entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." The entire guidance, plus a brochure on sexual harassment in schools, may be downloaded from OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/OCRpubs.html.

The guidance states that the following types of conduct constitute sexual harassment:

"Quid Pro Quo Harassment—A school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Quid pro quo harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

Hostile Environment Sexual Harassment—Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment. As outlined in this guidance, grievance procedures also provide schools with an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs." (Footnotes omitted.)

While harassment and hazing based on other federally protected categories (race, disability, ethnicity, etc.) have not been litigated and defined by the courts as much as sexual harassment, one can extrapolate from sexual harassment definitions for practical applications in other areas.

State guidelines prohibiting harassment in schools were promulgated in 1987 with the Wisconsin Administrative Code PI 9 to accompany the state's pupil nondiscrimination statute, s. 118.13 stats. This statute protects students in Wisconsin's public schools on the basis of their sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability. Thus, the prohibition against harassment reaches much more broadly than only sexual harassment. Under PI 9.02 of the Wisconsin Administrative Code, pupil harassment is defined as behavior toward pupils based on the protected categories, "which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment." Note the similarity to the federal guidance for sexual harassment.

A single nondiscrimination policy and procedure that applies to all areas covered by state and federal law is acceptable and probably easier to understand. If a single policy and procedure is adopted, it is important that care be taken to ensure it covers all areas covered by state law and all areas covered by federal law. It is also advisable to have a policy statement that discusses sexual harassment and includes definitions and examples of sexual harassment. A sample sexual harassment policy is included in this appendix.

Everyday Definitions. Harassment of any type can be verbal, physical, or graphic. It can be based on the gender (sex), race, disability, sexual orientation, or other characteristic of its target; in most cases, it is also a form of discrimination. "Tune in To Your Rights" (1985) provides the following examples of sexual harassment, which takes many forms:

- touching or grabbing
- comments about one's body
- sexual remarks or suggestions
- conversations that are too personal
- pornographic pictures or stories
- · dirty jokes
- obscene gestures
- offensive displays of sex-related objects
- staring in a way that seems too personal

The same booklet says that "Sexual harassment is unwanted and unwelcome sexual behavior that interferes with your life."

Of course, sexual and other harassment can escalate, into threats and use of force such as attempted or actual rape or assault. Educators in many states, including Wisconsin, are mandatory reporters of sexual assault and abuse. Find out your school's policy for suspected or known assault and abuse against students.

How It Comes Up In Athletics: Taunting, Baiting, and Trash Talk. Taunting and baiting are prohibited in all interscholastic sports. (See the individual sport's rule book for the playing rules that WIAA uses, based on rules decided by the National Federation of State School Associations.) The National Federation prohibits baiting, taunting acts or words, or "any form of taunting which is intended or designed to embarrass, ridicule, or demean others on the basis of race, religion, gender or national origin" (Section 5 Noncontact Unsportsmanlike Conduct By

Players, NF Handbook). These acts are really part of a bigger problem called "poor sportsmanship."

Unfortunately, unacceptable behavior is increasingly tolerated as part of athletic activity. Using ridiculing motions, pointing fingers and gesturing are ways in which an opponent can be taunted. The manner in which a score is made very often is intended to either intimidate or embarrass the opponent. An example is dancing in the end zone, pumping fists at the crowd after a basket in a taunting manner, or shouting in an opponent's face after a score. Another common example, used unfortunately by coaches and athletes alike, is yelling at a boy that he "throws like a girl" or similar reference to the other gender in an attempt to intimidate. "Trash talk" is becoming more prevalent and certainly does nothing but taunt or bait, which often results in responding inappropriate conduct and behavior.

Taunting and baiting an opponent is contrary to the basic concept of fair play and honorable competition. This is the exact opposite of the type of conduct, behavior and attitude that participation in athletics is intended to teach. Interscholastic sports provide countless opportunities for students to show good sportsmanship while dealing with teammates and opponents. Why then have we allowed it to become a place allowing the very worst acts of disrespect toward a teammate or an opponent?

The issue of touch. Harper (1995, page 13) says that "[Although].. our teachers' organizations and educational associations advise teachers to stop touching students, that is not easily done when touch is integral to athletic instruction. The problem becomes how to touch students and adults with integrity, safety and understanding of purpose." Harper makes the following suggestions:

- 1) Clearly state the purpose for touch in instruction before you begin, and ask permission to touch others before you do so.
- 2) Reassure students who are not comfortable with touch from others that you will make accommodation for them to receive instruction with which they are comfortable.
- 3) Clearly prohibit anyone from harassing, taunting, or ridiculing others when touch is a sensitive issue for them. Include the issues of touch and personal safety in your talk with your students at the beginning of each season.
- 4) Model the best behavior yourself while touching others.

We believe that touch is a necessary and welcome part of human interaction, when done with respect, care, and common sense. However, false or fabricated accusations, though infrequent, can happen. You can protect yourself by using the suggestions above, and by making sure your school's anti-harassment policy includes a section that prohibits and disciplines persons who make false or fabricated accusations.

Retaliation. Your school's policy prohibiting harassment should include a section that prohibits retaliation when complaints or allegations are made. All adults should intervene when they witness or discover threats, physical attacks, the silent treatment, or delays in communicating important information. As Harper notes, the purpose of retaliation is to intimidate or frighten. The effect is the most important reason why we must act to stop it immediately (*Harper*, page 14). Some effects are physically violent responses, or an unwillingness to report harassment when it occurs.

The important thing is that harassment in any form cannot be tolerated in athletics.

Coaches and other adults working in public schools carry a legal and ethical responsibility to make sure that it is prevented.

III. What can be done to protect athletes and adults?

Coaches must get directly involved in eliminating harassment from athletic events. A responsible coach will not allow it—and will react swiftly when it occurs. When the coach takes no action, he or she is simply sending the message that it is acceptable behavior. Allowing players or others connected to the activity to commit acts of taunting or baiting without a reprimand or removal from the game or site is really saying that the offensive behavior is "okay."

As the displays of poor sportsmanship through taunting and baiting seem to be increasing at the high school level, we may point our fingers at the colleges and pros for contributing to our problem, but we cannot shove the responsibility on to someone else. Taunting, baiting and trash talk simply cannot be tolerated as part of an educational program and educational experience. Officials must begin to strictly enforce the WIAA rules which prohibit such unsportsmanlike conduct. If everyone involved in athletics does his or her job, these undesirable acts will no longer be a part of interscholastic athletics.

A. Preventive Measures

- Know your district's sexual harassment policy and grievance procedure.
- Know the state requirements for mandatory reporting of assault and abuse.
- Train volunteers, students, coaches, boosters, officials and family members about prohibited behavior.
- Provide annual reminders to students and staff, that harassment will not be tolerated and carries serious consequences.
- Intervene early in student-to-student harassment situations; don't wait until it gets out of control.
- Learn to recognize and stop retaliation; stop rumors.
- Make prompt referrals. You don't have to be able to handle every situation. Know who can handle situations and who can back you up.
- Use posters throughout physical activity areas including your own office, locker rooms, training and weight rooms. Post the district's policies so anyone can find a copy and use them.
- Examine your own behavior, language, and your use of humor.
- Know the appropriate advice to share with those who want help stopping less severe harassment.
- Check the references and work history of any candidates for positions in your area, including volunteer coaches. "Negligent hiring" liability is possible if third parties are harmed by persons you hire
- Try asking students to evaluate their coaches. You may learn valuable information that could prevent problems later.

B. Protective Measures for Staff and Volunteers: Protecting Against Charges or Allegations

- Put staff, students, team members, volunteers, family members, coaches, transportation and locker room attendants, and officials on notice: no harassment in any part of the athletic program. Do this at the start of every season. Document giving this notice, and have witnesses.
- With staff and student leaders, identify all situations and locations that might put staff or students at risk: training and weight rooms, locker rooms, buses, motels during away games, younger or inexperienced coaches, volunteer coaches without sexual harassment training.
- Avoid risky situations and locations, such as being alone with students in a closed door session, lesson, taping, training or anything that might give rise to rumors of impropriety. This may also mean finding alternatives to driving students home from trips or practice and being alone in a car with them when no one else knows about it.

- Set and post objective criteria for cutting athletes from teams or squads in order to avoid charges of favoritism, bias, or discrimination that could lead to false allegations against coaches.
- Explain beforehand the purpose of any touch you will use in coaching. Give students a choice and don't ridicule students who may be uncomfortable.
- If you fear being "set up" for fabricated allegations, tell others, tell the initiators to stop, keep a journal of details, have witnesses with you at all times, and tell your administrator of your fears.
- Document, document, document your actions, responses to incidents, reports or complaints, and your efforts toward compliance. It may not be enough to DO the right thing—you might find it necessary to PROVE it also.
- Know the name and number of your teachers' organization representative, Title IX coordinator, and/or Equity Coordinator.

C. Handling Reports or Problems

- Have the district's sexual harassment policy and procedure handy.
- Know the names and numbers of the district's Title IX coordinator, Equity Coordinator, and Equity Team members. In Wisconsin, schools may call the Title IX Coordinator the s. 118.13 coordinator.
- Handle initial disclosures or reports sensitively and objectively. Don't jump to conclusions or make assumptions. Provide support to the individual until you can get them to the person who can handle their complaint/report or request.
- Avoid talking with students or adults without another person present as a witness of your appropriate behavior and advice.
- Engage individuals emotionally, but remain objective. Ask only open-ended questions so you can get enough information to determine the nature and severity of the problem. Then, if possible, go with the individual to the person who is responsible for handling these situations.
- Reserve judgment! And keep confidential any situations disclosed to you. You would want the same courtesy if you were involved.
- Document! Document your actions, advice, and follow-up!
- Remind everyone that retaliation is strictly prohibited and may be disciplined as a separate violation. Stop it and report it if you witness it or hear about it. Retaliation alone can "poison" any school or work environment until no one feels safe to report problems.

Above all, take seriously all reports of harassment, abuse and assault. An investigation will determine if the allegations are true and how serious they may be. Your initial responsibility is to take the reports seriously and report them to the responsible school administrator.

D. Resources

For more complete information and strategies for prevention and intervention, see "Guidelines for Coaches, Health and Physical Educators in Preventing and Stopping Sexual Harassment in Athletics," by Pat Callbeck Harper, Harper Consulting Group, 301 South Oakes Street, Helena, Montana 59601-4638 Phone 406/443-1747; fax 406/443-4946 (\$15.00 including postage & handling).

"Tune in to Your Rights...A Guide for Teenagers about Turning Off Sexual Harassment" (1985). A 21-page booklet. Programs for Educational Opportunity, 1033 School of Education Building, The University of Michigan, Ann Arbor, Michigan 48109-1259. Phone (313) 763-9910 (\$3.00 per booklet; available in English and Spanish; reductions for larger orders).



Sample Sexual Harassment Policy

(Note: Every school district should design its own policy and be prepared to update the policy if it is not effective.)

I. General Policy

Sexual harassment (including sexual violence) is a form of discrimination prohibited by Title IX of the Education Amendments of 1972, and by the Wisconsin Pupil Nondiscrimination Law (sec. 118.13, Wis. Stats. and Chapter PI 9, Wis. Admin. Code). Sexual harassment is any unwanted attention that is sexual in nature. Sexual violence is a physical act of aggression that involves a sexual act or has a sexual purpose.

The (name of school district) is committed to maintaining a learning environment that is free from sexual harassment and sexual violence, where all members of the school community may learn and study comfortably and productively. The (name of school district) prohibits any form of sexual harassment or sexual violence.

It shall be a violation of this policy for any school district employe or student to subject a student to sexual harassment as defined by this policy. It shall be a violation of this policy for any school district employe or student to subject a student to any act of sexual violence.

The (name of school district) will make every effort to prevent and eliminate sexual harassment by all persons who come into the schools, including staff, students, parents, suppliers, and any other visitors or guests.

The (name of school district) will investigate all reports of sexual harassment or sexual violence and discipline any student or employe who sexually harasses a student or subjects a student to any act of sexual violence. As required by law, teachers, counselors, or administrators shall report to law enforcement authorities any suspected abuse of a child. As required by law, teachers, counselors, or administrators shall report to law enforcement authorities any suspected abuse of a child.

II. Definition of Sexual Harassment and Sexual Violence

Sexual harassment means unwelcome sexual advances, requests for sexual favors, physical conduct that is sexual in nature or sexually motivated, or any other conduct, including oral, written and nonverbal forms of communication, in which:

submission to such conduct is implicitly or explicitly made a term or condition of obtaining an education, or of admission or participation in any school program or activity, or receiving the benefit of the services of the school or any school program or activity;

submission to or rejection of such conduct is used as a factor in decisions and actions affecting a student's education; or

the conduct has the purpose or effect of substantially interfering with the student's school performance or creating an intimidating, hostile, or offensive school environment.

The following are examples of behavior that is sexual in nature and which, if unsolicited or unwelcome, amounts to prohibited sexual harassment:

- Written communication—sexually suggestive or obscene letters, notes, invitations, drawings, or computer messages.
- Oral communication—comments, jokes, or threats that are sexually suggestive or have a sexual content; sexual propositions; or statements about a person's body or physical characteristics. This includes jokes about gender-specific characteristics.
- Physical contact—intentional touching, such as pats, squeezing, or brushing against a person; body blocking; assault; or coerced sexual contact or intercourse.

• Other non-verbal communication—this means conduct that does not involve written or oral communication or physical contact, and includes suggestive looks, leering, staring, gesturing, posturing or other physical acts, or displaying any sexually suggestive object or item (e.g., photographs or drawings, or exposing oneself).

III. Filing A Complaint About Sexual Harassment

A complaint of sexual harassment may be filed under the (name of school district)'s pupil nondiscrimination complaint procedure (include cross-reference to district's complaint procedure). Any complaint will be investigated and acted upon under the complaint procedure and, if appropriate, under the school district's disciplinary policies and procedures. The (name of school district) may, in its discretion, take appropriate and immediate action to protect a complainant, student, witness or any other person, from harassment or retaliation pending the completion of a complaint investigation.

IV. Reporting Sexual Abuse

In some cases, sexual harassment or sexual violence may also constitute sexual assault, child abuse, or both. The (name of school) district will report any suspected abuse of a child to law enforcement authorities, as required by law. Where necessary, the school district will take immediate and appropriate action to protect a victim of child abuse or sexual assault.

V. Training

Training is the key to establishing an effective sexual harassment/sexual violence prevention plan. Annual training sessions will be held for all employes and students. All new employe orientation will include training in preventing and responding to sexual harassment and sexual violence. All administrators and teachers will be trained to maintain schools free from sexual harassment and to handle pupil discrimination complaints.

Pull-out Section for Parents and Guardians

Please feel free to photocopy this document.

I. Introduction

A. How to use this section.

- Schools: tear it out and copy for parents.
- Use it for equity questions and concerns. This does NOT answer all questions concerning interscholastic athletics, only those concerned with equitable access and participation, regardless of gender, race, and other protected classifications. Because most of the changes that have occurred in interscholastic athletics in the last 25 years are due to requirements for gender equity under Title IX, the majority of equity issues concern equity between boys' and girls' sports. This document reflects that concentration.

B. Why this section?

We all—coaches, athletic directors, principals, the Wisconsin Interscholastic Athletic Association Staff, and staff at the Department of Public Instruction—receive many calls about equity issues in athletics. We hope this document will answer some of them and save phone calls/time. We want to provide a complete listing of where to go to get the best answers to questions concerning equity in K-12 athletics.

We want to help achieve equity in interscholastic athletics for both girls and boys.

Parents need and want to support their daughters and sons in sport. Athletics are visible in communities and draw the attention and support of community members, including equity advocates. We want to provide easy access to common questions and concerns regarding equity in sports.

II. Nondiscrimination Law

A. What does the law say about athletics?

Federal Law. Title IX of the federal Education Amendments of 1972 states that "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Congress has made it clear through passage of the Civil Rights Restoration Act of 1987 that all programs and activities of an educational institution are required to comply with Title IX if any of its programs receive federal funding. Virtually every public school in Wisconsin receives federal funding of some type.

The regulations implementing Title IX took effect in 1975. Section 34 CFR s. 106.41 prohibits discrimination on the basis of sex in athletic programs and mandates that schools provide equal athletic opportunity to both girls and boys. There are ten factors that are analyzed to ensure equal opportunity:

- 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
 - Provision of equipment and supplies;
 - 3) Scheduling of games and practice;

- 4) Travel and per diem allowance;
- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services (usually more applicable to postsecondary institutions); and
- 10) Publicity.

State statute and administrative rule. Wisconsin statute s. 118.13, which applies to public schools, states that "No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational, or other program, or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional or learning disability."

The Wisconsin Administrative Code which helps implement this statute, PI 9, contains several sections that apply to interscholastic athletics. In short, it requires school districts to prohibit discrimination and harassment, and to periodically evaluate trends and patterns and school district support of athletic programs.

Both federal and state laws require all public school districts to adopt and disseminate to the public a policy that prohibits discrimination on the basis of sex and other protected categories, a complaint procedure, and to designate an employe to receive complaints. Parents and guardians should be able to find the above readily, or should be able to contact the school district to receive information about the district's policies and procedures.

B. What does the law mean in practical terms for public school competitive athletic (interscholastic) programs?

Schools must make every effort to provide an equal opportunity for both girls and boys to take part in interscholastic athletics. It is often difficult to know which comes first, however: interest from the students or encouragement by adults. Schools should use a student survey every two or three years to assess student interest. If there is no interest on the part of the girls, for example, to play soccer, despite the best efforts of the school to encourage their involvement, then the school is not obligated to offer soccer, even if there is a soccer program for boys run by the school. If the school can show that it has tried to interest students in a sport or sports, but no interest (or not enough for a team) develops, the school is not required to have an equal number of sports for boys and girls.

If a sport is offered, the school must make every effort to meet the needs of the athletes in that sport. The school is NOT required to spend an equal amount of money for girls and for boys, but rather to fully meet the needs of the sport. Nor is the school required to provide exactly the same expenditures at exactly the same time for comparable sports, such as girls' and boys' basketball. Many schools meet the needs of the athletes and the sport by having a rotating schedule for purchase of uniforms and equipment. That means that one year, the girls might get new uniforms, but the boys may not get new uniforms until two years later, per a long-term schedule.

III. What To Do If You Have A Question On Athletics

It is important to note that the courts have determined that athletic participation is a privilege, not a constitutional right available to all students.

Keep in mind the following guidelines:

- While you think something happening at your school is discrimination or harassment, it may not be prohibited by law. All students in Wisconsin public schools are protected from discrimination and harassment on the basis of sex, race, religion, national origin (including students whose dominant language is not English), creed, ancestry, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional or learning disability.
- There are many other practices that may not appear to be fair, in your opinion, but you may not have legal recourse; you may have to make your feelings known through other means. Other means may include speaking out at a school board meeting, contacting the school staff member involved in the issue, or working with other parents to bring the issue to the attention of the school. An example of such an issue is your feeling that your son or daughter is not getting enough playing time. You may feel that the coach is biased, but unless that bias is based on the student's sex, race, national origin, or other protected category, the discrimination law does not apply.
- Your school administrator deals with personnel/employment issues; they are a local issue, not usually a state or national issue.

If you have a question or a concern....

1. Contact your local coach, athletic director, or school administrator first. They should be better able to handle issues close to home.

Local employes should handle the following types of issues:

- practice times and schedules
- complaints about coaches, team members, cheerleaders, or others connected with an event
- how to file a complaint of discrimination or harassment prohibited by federal and state law that you think happened at your school
- the school district's policy prohibiting harassment and discrimination.

2. If you can't get the answer from the local school employe, THEN

Call DPI if it's about:

- Call WIAA if it's about:
- content of state and federal discrimination and harassment laws or the process of filing a complaint
- how to file an appeal to the state superintendent of a local discrimination/ harassment complaint
- where to find resources to provide training for students or school employes on harassment and discrimination
- rules of eligibility
- establishing or creating teams
- equitable opportunities

DPI contacts:

WIAA contacts:

Hal Menéndez, Consultant Pupil Nondiscrimination Program (608) 267-9157 Douglas Chickering, Executive Director

Karen Kuhn, Associate Director

Ken Wagner, Consultant Division for Learning Support: Equity and Advocacy (608) 267-9145 (715) 344-8580

- 3. You may file a complaint with the U.S. Department of Education, Office for Civil Rights against your school district, alleging violation of the federal law Title IX of the Education Amendments of 1972. The office that serves Wisconsin is:
 - U.S. Department of Education, Office for Civil Rights—Region V, 111 North Canal Street, Chicago, Illinois 60606 (312/886-8434).

Web page address: http://www.ed.gov/offices/OCR/ocrpubs.html

4. You may file a complaint in federal civil court alleging sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment in sports programs. For legal information or a referral to an attorney, contact:

State Bar Lawyer Referral and Information Service 1-800-362-9082

Questions Parents and Guardians Often Ask

1. Why is there a disparity between the number of athletic offerings between females and males?

In counting and listing the sports offered, certain sports which do not have girls' teams are included (for example, football, hockey, wrestling). However, girls may participate on the boys' teams in these sports. Thus, while the listing or count may show a disparity in the number of sports offered, opportunities are available for girls to participate in these sports.

2. How should cheerleaders and band be assigned to games to be equitable between girls' and boys' contests?

Athletic schedules should be reviewed and schedules established with an equal number of contests represented for both boys' and girls' events. If there is a problem filling out cheerleading squads or pep band numbers, districts should look into bringing up JV cheerleaders to fill in for an evening, or lower level band members to sit in for an evening to fill out the needed numbers. Basically both boys' and girls' squads should have the same number of contests represented by cheerleaders, pompon, or pep bands. However, JV cheerleaders or lower level band members should not be assigned to fill in only at boys' games or only at girls' games; they should participate in an equal number of boys' and girls' games.

3. How do I get the school to start a team? For example, there is a boys' golf team and no girls' team. Furthermore, there are more boys' teams than girls'. What steps do I follow to make a proposal?

The first step is to ask your school to survey students to find out if there is a desire to participate in the particular sport you are looking to start. Once a need has been established, the next step is to present your findings to the administration and allow them a chance to study existing programs and how they will meet the needs of the newly identified sport. Due to budget constraints adding sports is very difficult; however, the law does not allow the excuse of lack of funds to stand in the way of addressing equity issues.

4. How does a coach decide who gets on the team and who plays?

Each coach sets the standards for their team as well as the goals and objectives for each level within the team (varsity, junior varsity, and freshman). These standards should be communicated to parents and athletes before the season starts, thus providing everyone with knowledge of how the teams will be formed and what players and parents can expect from the coach and program. You usually see different goals and objectives at different levels within a program. How a freshman basketball team is formed and playing time established at that level is usually different from the varsity.

5. In what sports are girls or young women allowed to compete?

Girls are allowed to compete in any sport in which there is not a comparable athletic opportunity within the district. If a school has a girls' basketball program, a girl cannot go out for the boys' team. However, if there is a boys' basketball team and not a girls' team, any girl could then go out for the boys' teams. That is why you will see girls participating in hockey, wrestling, and football.

6. How does a coach decide who earns participation letters?

The award system for each sport is a result of an individual coach's personal philosophy or that of the school. The award system should be communicated to parents and athletes before the season starts.

7. What is the proper complaint procedure that a school should have?

There is no one proper complaint procedure or policy. There are a few points which should be considered in the development of a district complaint procedure. The complaint procedure must be written. It must provide for written acknowledgment of a complaint within 45 days of the date it is filed, and for a final written decision by the district within 90 days of the date a complaint is filed. Parents, athletes, coaches, administrators, and other interested parties should be included in the development of policies and procedures. The policies and procedures should be reviewed by the school board and communicated to parents and athletes before the beginning of each season. (Appendix B is an outline of the complaint process. Appendix C is a sample complaint procedure.)

8. I feel my child is being discriminated against, but I don't want to file a formal complaint because I am afraid of retaliation against my child. How can I get the discrimination to stop?

If you are uncomfortable reporting a problem due to concerns about retaliation, you are greatly hindered in seeking elimination of the practice. You might talk with other parents, looking for others with similar concerns. If you can find others willing to take a similar stance, it shows there may indeed be a problem administration needs to address. Another possibility would be to wait for the season to be over and then present your concerns. To do nothing allows the practice.

9. Why can a girl try out for a boys' sport but a boy can't try out for a girls' sport?

The courts have generally held that because of past inequities in girls' sports programs it would jeopardize participation opportunities for girls to permit boys to compete on girls' teams. The U.S. Department of Education has interpreted the law to be permissive in this regard; that is, state athletic organizations may permit boys to play on girls' teams. However, the WIAA holds a philosophical position that agrees with many courts: boys, because of many more years to develop skills and strength, will in many cases take over girls' teams and girls' opportunities will be limited.

10. My child has a disability and wants to participate in sports. What must the school do to permit her participation?

The law requires that disabled students be afforded an equal opportunity to participate in extracurricular activities, including sports. The steps, if any, the school must take to permit a disabled student to participate in a sport will depend on the specific facts of each case, including the nature of the disability and the particular sport.

11. My child is disabled and is in a special education program. Her education plan calls for participation in athletics. If she wants to play on a team, must the district place her on a team?

No. The school should take steps to provide a disabled student an equal opportunity to participate in athletics with nondisabled students to the maximum extent appropriate to the needs and abilities of the disabled student. The student may not be denied the opportunity to try out for a team, or be excluded from a team, because of her disability. However, decisions regarding the selection of team members, position played, level of participation, and playing time, all involve the exercise of judgment and a great degree of discretion by the coach.

Assessing Equity in Interscholastic Athletics Kathleen McNickels, Author

If the answers to all the following questions are "yes," then the school district will know that it is on the right track to compliance with Title IX and Wisconsin statutes and rules. If, however, many answers are "no," then the school district will know that it must make some changes.

I. Accommodation of Interests and Abilities

Determining substantial proportionality between enrollment and athletic participation.

Year	Boys	Girls	Total
Percentage			100%
Enrolled			
Number of			
Athletes			
Percentage of			100%
Athletes			
Difference			

When counting the number of athletes, count the total number of opportunities or filled slots. For example, one male athlete who participates in football in the fall and track in the spring would count as two opportunities.

Do not include cheerleaders, drill team, pep band, or other participants whose activity is not a sport.

Sample

1996-97	Boys	Girls	Total
# Enrolled	1600	1525	3125
% Enrolled	51%	49%	100%
# Athletes	235	165	400
% Athletes	59%	41%	100%
Difference	8%	-8%	

The above sample demonstrates a disparity that is not substantially proportionate. The school district should assure itself that it is meeting the interests, needs and abilities of historically undeerrepesented students, through survey or other quantifiable means.

Question	Yes	No
1. Are interscholastic level participation opportunities for male		
and female students provided in numbers substantially		
proportionate to their respective enrollments? (Complete table		
above.)		
2. If your district has not achieved substantial proportionality,		
can you show a history and continuing practice of program		
expansion which is demonstrably		
responsive to the developing interests and abilities of the		
underrepresented sex? [Has the District added sports or levels of		
sports (varsity, j.v., soph)?]		
3. If not, can the district show that the interests and abilities of		
the members of the underrepresented sex have been fully and		
effectively accommodated by the present program? Does the		
district have an assessment tool, such as a survey, to determine		
whether students' athletic interests are being met by the current		
athletic program? (Sample surveys Appendixes F and G.)		
4. Do boys' and girls' teams compete at equivalent levels of		
competition (similar state classification levels)?		
5. Do you have a written policy or procedure for determining		
whether, how and which sports will be added to the girls' and		
boys' interscholastic athletic programs?		
6. Does the district have a "cut" policy that is equivalent for		
athletes who try out for boys' and girls' teams?		
7. Does athletic participation in intramural sports indicate		
interest that would warrant elevating those sports to		
interscholastic status?		
8. Does athletic participation in club sports indicate interest that		
would warrant elevating those sports to interscholastic status?		
9. Does the district offer all the sports which are available in		
neighboring regions?		

II. Equipment and Supplies

Question	Yes	No
1. Does the District have a written nondiscriminatory policy or		
procedure for providing, maintaining, and replacing equipment		
and supplies?		
2. Does the District have a maintenance and replacement		
schedule for equipment, supplies, and uniforms, which is		
equitable for all teams?		
3. Do boys' and girls' teams receive new uniforms and		
equipment on an equitable rotation?		
4. Are boys' and girls' teams provided an equivalent number of		
uniforms?		
5. Are any teams required to share uniforms?		
If so, is uniform sharing equitable for boys' and girls' teams?		

6. Are boys' and girls' teams provided an equivalent amount of other equipment and supplies?	
7. Are boys' and girls' teams provided an equivalent quality of uniforms?	
8. Are boys' and girls' teams provided an equivalent quality of other equipment and supplies?	
9. Do the equipment storage areas provide an equivalent amount of storage space for girls' and boys' teams?	
10. Are the locations of equipment storage areas equivalently convenient for boys' and girls' teams, e.g., distance from locker rooms, practice, and competitive facilities?	
11. Are the hours the equipment storage is open and equipment available equivalent for girls' and boys' teams?	
12. Are student managers equivalently available to girls' and boys' teams?	
13. Are equivalent uniform laundry services available to girls' and boys' teams?	
14. Are boys' and girls' teams provided with equipment and supplies of equivalent suitability (e.g., equipment that is regulation, officially sanctioned, meets rules or specifications).?	

III.SCHEDULING

Question	Yes	No
1. Does the District have a written nondiscriminatory policy or		
procedure for establishing competitive and practice schedules and		
permitting pre-season or post-season competition?		
2. Are teams scheduled to compete in an equivalent percentage		
of their maximum allowable number of competitions?		
3. Do boys' and girls' teams share the prime time, or preferred,		
competitive time slots?		
4. Do boys' and girls' teams share the preferred time for		
scheduled practice?		
5. Review which days of the week practices are scheduled. Are		
girls' and boys' teams provided equivalent opportunity to practice		
on the preferred days?		
6. Review the length of each practice session. Are boys' and		
girls' teams provided an equivalent amount of practice time?		
7. Are boys' and girls' teams practicing an equivalent number of		
days each week?		
8. If available, are girls' and boys' teams given equivalent		
opportunity to participate in preseason competition?		
9. Are boys' and girls' teams given equivalent opportunity to		
participate in post-season competition?		

Participation in Athletic Programs: Clearing the Title IX and Equal Protection Hurdles Cynthia Lutz Kelly, Deputy General Counsel Kansas Association of School Boards Topeka, Kansas

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Introduction

Claims of discrimination on the basis of sex are not new to educational institutions, but throughout the 1990s they are being brought and won by female students with increasing regularity. Male students, too, have brought challenges, but with less success. Shortly after the enactment of Title IX of the Education Amendments of 1972, athletic programs for girls and women blossomed. In the current era of financial constraints, however, many educational institutions have cut back on efforts to expand opportunities, and in some cases have retrenched existing programs. These actions have resulted in claims of discrimination, costly settlements, expensive litigation, and court control over athletic programs. School boards and school administrators should be aware of these developments when making decisions about the future of their athletic programs.

Title IX Requirements

Statutory and Regulatory Provisions

Title IX of the Education Amendments of 1972, 20 U.S.C. ss. 1681, *et seq.*, prohibits discrimination on the basis of sex in educational programs or activities which receive federal financial assistance. Although Title IX was interpreted to be program-specific by the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), with the passage of the Civil Rights Restoration Act of 1987, 20 U.S.C. ss. 1687 (1988), Congress made it clear that all programs and activities of an educational institution are required to comply with Title IX if any of its programs receive federal funding.

The regulations implementing Title IX took effect in 1975, but the compliance deadline for intercollegiate athletics was delayed until December 1979 when a Policy Interpretation explaining those sections of the regulations was issued by the Department of Health, Education and Welfare, the agency then responsible for enforcement of Title IX. The Title IX regulations contain two provisions which apply specifically to athletic programs at educational institutions. The first, 34 CFR ss. 106.37(c), addresses the issue of financial aid based on athletic ability in intercollegiate athletics, and is of little concern to public school districts. The second, 34 CFR ss. 106.41, prohibits discrimination on the basis of sex in athletic programs and mandates that schools provide equal athletic opportunity to members of both sexes. This regulation applies to elementary and secondary programs, as well as post-secondary athletic programs. The regulation, in subsection (c) of ss. 106.41, lists ten factors that should be considered in determining if equal opportunities are available:

¹Since the creation of the U.S. Department of Education, Title IX has been enforced by the Office for Civil Rights of that department.

- 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- 2) Provision of equipment and supplies;
- 3) Scheduling of games and practices;
- 4) Travel and per diem allowance;
- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice, and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services; and
- 10) Publicity.

Although each factor appears to be of equal importance in the regulation, in practice the accommodation of athletic interests and abilities of the members of both sexes is analyzed separately from the remaining nine factors which are generally considered together in determining whether there is equivalence in athletic benefits provided to members of both sexes.

Policy Interpretation and Letter of Clarification

In response to numerous questions about the application of Title IX to athletic programs, HEW issued a Policy Interpretation in December, 1979 which directly addressed the issue of compliance with Title IX in intercollegiate athletics.² Although written specifically for intercollegiate athletic programs, the Policy Interpretation itself suggests that the general principles in the document will often apply to club, intramural, and interscholastic athletic programs which are also covered by Title IX and its regulations.³ Further, courts considering Title IX challenges to high school level programs have consistently applied the Policy Interpretation and have afforded the agency's interpretation of the applicable regulations substantial deference.⁴

The Policy Interpretation sets forth three major areas of regulatory compliance: 1) Athletic Financial Assistance; 2) Equivalence in Other Athletic Benefits and Opportunities; and 3) Effective Accommodation of Student Interests and Abilities. Each will be discussed in more detail.

1) Athletic Financial Assistance⁵

Compliance in the area of athletic financial assistance is measured by determining if the amount of financial assistance awarded to members of each sex is substantially proportionate to their respective rates of participation in athletic programs. However, an institution may be in compliance with Title IX even if there are disparities in proportionality when those disparities result from nondiscriminatory factors. Further, at least one court found no violation of Title IX

² Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (December 11, 1979).

³ *Id.* at 71,413. Further the OCR Title IX Investigator's Manual, the document used by OCR when determining if an educational institution has violated Title IX, suggests that the factors listed in the Policy Interpretation will apply to interscholastic athletics unless otherwise stated in the manual.

⁴ See Williams v. School Dist. of Bethlehem, 998 F.2d 168 (3rd Cir. 1993); Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994).

⁵ 44 Fed. Reg. at 17,415.

where the proportion of athletic scholarship dollars going to female athletes was far greater than their rate of participation.⁶

Equivalence in Other Athletic Benefits and Opportunities⁷

Equivalence in the treatment of athletes of both sexes is the standard for judging compliance in the area of athletic benefits and opportunities. Identical treatment is not required if the overall effect of the difference is negligible or if the differences result from nondiscriminatory factors.⁸ Differential treatment, however, cannot be justified based on differences in the amount of revenue generated by a sport relative to other sports.

Compliance is determined by examining the athletic program as a whole. Differences afforded to members of one sex in a particular sport may be offset by differences afforded to members of the other sex in another sport. In determining if equivalence exists, the last nine items listed in the regulation are examined to determine the availability, quality and kinds of benefits, opportunities, and treatment which are afforded to members of each sex.

Equipment and Supplies. In the area of equipment and supplies, the quality, amount, suitability, and availability of equipment and supplies are the factors assessed. Maintenance and replacement schedules are of equal importance. Equipment and supplies include not only sport-specific equipment, but also uniforms, other apparel, instructional devices, and conditioning and weight training equipment.

Scheduling of Games and Practice. Compliance in this area is assessed by looking at the equivalence for men and women of the number of competitive events per sport, the number and length of practice opportunities, the time of day that competitive and practice opportunities are scheduled, and the opportunities to engage in available pre-season and post-season competitions.

Travel and Per Diem Allowance. Equivalence in the area of travel is assessed by considering the modes of transportation used, the housing furnished during travel, the length of stay before and after athletic competitions, the amount of per diem allowance provided, and dining arrangements for teams while traveling.

Opportunity to Receive Coaching and Academic Tutoring. The relative availability of full-time and part-time or assistant coaches, as well as graduate assistants at the college level, are factors which will be assessed in determining compliance with coaching assignment equivalence. With regard to academic tutoring, the availability of tutoring, along with the procedures and criteria for obtaining tutorial assistance are the primary considerations.

Assignment and Compensation of Coaches and Tutors. OCR does not look at an institution's employment practices under Title IX, except to the extent that compensation or assignment policies or practices with regard to coaches deny male or female athletes coaching of an equivalent quality, nature, or availability.⁹

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⁶ Although the regulations suggest that substantial proportionality between amount of assistance and rate of participation is the test, in *Gonyo v. Drake University*, 879 F. Supp. 1000 (S.D. Iowa 1995), the court concluded that the over-allocation of financial assistance to female athletes did not violate Title IX.

^{7 44} Fed. Reg. at 71,415-17.

⁸ The unique aspects of particular sports such as the nature of equipment required for the sport, or the nature of the facilities required for competition may be nondiscriminatory factors which can be considered. However, the school must be certain that it meets the sport specific needs for members of both sexes. Expenditures which are required because of anticipated crowds may also be a nondiscriminatory factor, so long as event management support is available to both men's and women's teams and is based on sex neutral criteria.

⁹ See Deli v. University of Minnesota, 863 F. Supp. 958, 962-3 (D. Minn 1994). (Because plaintiff did not claim or provide evidence to suggest that due to her receipt of a lower salary than those received by coaches of some men's teams, her coaching services were inferior in quality, nature or availability to those provided to men's teams, she has failed to make a prima facie claim for violation of Title IX.)

With regard to compensation of coaches, factors considered by OCR include the rate of compensation per sport and per season; the duration of contracts; the conditions relating to contract renewal; experience; working conditions and other terms and conditions of employment. Differences in compensation may be justified by nondiscriminatory factors such as the range and nature of duties, the experience of individual coaches, the number of participants in the sport, the number of assistant coaches supervised, and the level of competition. In examining compensation of tutors, OCR considers the qualifications, training, and experience of tutors.

Compliance in assignment of coaches is assessed by examining the equivalence in training, experience, other professional qualifications, and professional standing. For tutors the relevant factors include the hourly rate of pay by the nature of the subjects tutored, pupil loads, tutor qualifications, experience, and other terms and conditions of employment.

Provision of Locker Rooms, Practice, and Competitive Facilities. In this area the quality, availability, maintenance, and preparation of practice and competitive facilities are factors which are considered. Additionally, the quality and availability of locker rooms are assessed for equivalence for men and women. Sport specific needs may justify differences in locker room equipment, so long as sport specific needs are met for members of both sexes.

Provision of Medical and Training Facilities and Services. The availability of medical personnel or assistance, the availability and quality of conditioning and weight training facilities, the availability and qualifications of athletic trainers are the factors assessed to determine compliance in this area. Additionally, health, accident, and insurance coverage, and its availability on equivalent terms are a consideration.

Publicity. The quantity and quality of publications and promotional activities featuring teams of members of both sexes, along with access to publicity resources and sports information personnel are factors considered in determining equivalence in the area of publicity.

3) Effective Accommodation of Student Interests and Abilities. 10

Although OCR indicates that it will consider accommodation of student interests and abilities in conjunction with the preceding factors in determining compliance with Title IX in the program as a whole, recent litigation in the Title IX arena has focused heavily on the element of accommodation. In this area, OCR indicates it will consider how a school determines the athletic interests and abilities of its students, the selection of sports offered, and the levels of competition available in determining if the institution is fully and effectively accommodating student interests and abilities.

In the area of selection of sports, Title IX does not require that a school integrate all of its athletic teams, nor does it require that exactly the same choice of sports be available for men and women. In certain circumstances, however, a school may be required either to permit the excluded sex to try out for an existing single-sex team or to sponsor a team for the previously excluded sex. If the sport is a contact sport, a separate team must be provided if the opportunities for members of the excluded sex have been historically limited, there is sufficient interest and ability among students of the excluded sex to sustain a viable team, and there is a reasonable expectation of competition for the team. If the sport is a non-contact sport, in addition to those factors, there must also be a finding that members of the excluded sex do not possess sufficient skill to be selected for or compete actively on a single integrated team.¹¹

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^{10 44} Fed. Reg. at 71,417-18.

This portion of the Policy Interpretation mirrors the regulatory requirement found at 34 CFR ss. 106.41(b). The regulation itself suggests that contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or majority activity of which involves bodily contact.

A majority of courts have concluded the inquiry as to whether opportunities for members of the excluded sex have been historically limited is focused on overall athletic opportunities, not limited to opportunities in a particular sport.¹² Further, the mere opportunity to try out for a team previously limited to members of one sex is not determinative of the question of whether opportunities have been previously limited under Title IX. Athletic opportunities must be real opportunities to participate and play on the team, not illusory ones.

Compliance in the area of levels of competition is assessed in one of three ways: 1) by determining if participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; 2) if the institution cannot show substantial proportionality, by determining if the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the interests and abilities of members of the underrepresented sex; or 3) if the institution cannot show substantial proportionality or a history and continuing practice of a program expansion, by demonstrating that the interests and abilities of members of the underrepresented sex have been fully and effectively accommodated by the present program. An institution is deemed to be in compliance with this test if it can meet any of the three prongs of the test.

Applying this three-part test, in the 1990s, several courts have considered the question of institutional compliance with Title IX.¹³ More recently, the cases and settlement agreements entered into with OCR have involved not only college programs, but high school athletic programs as well.¹⁴

Findings of non-compliance by both courts and OCR have led to institutional anxiety and congressional concern with the OCR interpretation of Title IX's requirements. In response to these concerns, in January 1996, the Office for Civil Rights issued a further clarification of the three-part test which it uses in determining if interests and abilities are being effectively accommodated. The specific dictates of the clarification will be discussed in tandem with requirements established through case law in the next section.

Case Law Under Title IX

Since 1993, several circuit courts of appeals have decided cases alleging violations of Title IX in athletic programs. While most of these cases have involved intercollegiate athletic programs at universities, the most recent case, *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d

¹² See Williams, 998 F.2d at 635, and cases cited therein.

¹⁹ See Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993); Cook v. Colgate University, 992 f.2d 17 (2nd Cir. 1993); Favia v. Indiana University of Pennsylvania, 7 F.3d 332 (3rd Cir. 1993); Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994); Roberts v. Colorado State Bd. of Agriculture, 998 F.2d 824 (10th Cir. 1993).

¹⁴ Horner, 43 F.3d 265. See, also, Sanders v. University of Texas at Austin, Civil No. A-92-CA-405 (W.D. Tex. Oct. 24, 1993). (University agreed to raise women's participation in varsity athletics from 23% to 44% over a period of three years, and to increase the percentage of scholarships to female athletes to 42% after a five year phase in period); Schuck v. Cornell University, Civil No. 93-CV-756 FJS-GJD (N.D.N.Y. Dec. 8, 1993). (University agreed to reinstate women's gymnastics and fencing teams); Kiechel v. Auburn University, Civil No. 93-V-474-E (M.D. Ala. July 19, 1993). (University agreed to elevate women's soccer from club level to varsity status, to commit \$400,000 to women's varsity soccer for operating expenses during the first two academic years, to construct permanent practice and game fields, to phase in scholarships at a predetermined rate, and to pay the plaintiffs \$60,000 in damages and \$80,000 in attorneys' fees and expenses); "Nebraska District Settles Title IX Athletics Case," School Law News, Vol. 24, No. 4, February 23, 1996, p. 5 (Minden, Nebraska, school district agreed, inter alia, to start a girls' varsity softball program and pay \$75,000 in damages and attorneys' fees); "Title IX Settlement Seeks Equitable Team Schedules," School Law News, Vol. 23, No. 17, August 25, 1995, p. 5 (Holdrege, Nebraska, school district agreed, inter alia, to schedule more girls' athletic events on weekends and to provide equipment and coaching on par with what is provided for boys' programs); "Georgetown Signs Title IX Compliance Letter," School Law News, Vol. 23, No. 16, p. 1; "N.C. High Schools To Offer Fast-Pitch Game for Girls," School Law News, Vol. 22, No. 17, August 26, 1994, p. 7. (Hoping to head off bias complaints, about 30 North Carolina public high schools determined they would start offering fast-pitch softball in the fall of 1994.)

¹⁵ Roberts, 998 F.2d at 831.

265 (6th Cir. 1994), involved a challenge to the methods used by the Kentucky High School Athletic Association (KHSAA) for sanctioning sports. Specifically, twelve female student athletes alleged that the KHSAA and the Kentucky State Board of Education discriminated against them on the basis of sex, in violation of their rights under Title IX and the Equal Protection Clause of the Constitution, by sanctioning fewer sports for girls than for boys and by refusing to sanction fast-pitch softball.

Initially, the court concluded that since the functions of the KHSAA are statutorily decreed to be those of the Kentucky State Board of Education, a recipient of federal funds, KHSAA was also a recipient of federal funds within the meaning and intent of Title IX. The court, looking to the Policy Interpretation's test for accommodation, next concluded genuine issues of material fact precluded the granting of summary judgment in the case.

In *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), members of the women's gymnastics and volleyball teams obtained a preliminary injunction to stop the university from demoting their teams from full varsity to intercollegiate club status. The action, alleging a violation of Title IX, was brought as a class action after the university, as a belt-tightening measure in a time of financial difficulties, announced it would demote these two sports, along with men's golf and water polo.

The university's refusal to elevate women's hockey from club to varsity status formed the basis of the Title IX action in *Cook v. Colgate University*, 802 F. Supp. 737, *vacated and remanded*, 992 F.2d 17 (2nd Cir. 1993). The district court, concluding that the university had violated Title IX, ordered it to grant varsity status to the club. On appeal, the Second Circuit avoided the merits of the action by finding the action rendered moot by the end of the hockey season and the graduation of the last students bringing the action.

Proposed elimination of four varsity athletic programs, men's tennis and soccer and women's gymnastics and field hockey, resulted in a class action suit by four female athletes alleging violation of Title IX in *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993). After the plaintiffs obtained a preliminary injunction ordering reinstatement of the two women's sports, the university sought modification of the injunction to allow it to replace women's gymnastics with women's soccer. The district court's denial of the motion to modify was affirmed by the Third Circuit Court of Appeals, even though the evidence showed the addition of soccer would be less expensive and involve the participation of more women athletes

Students and former members of the women's varsity fast-pitch softball team at Colorado State University challenged the discontinuation of their sport, seeking reinstatement of the program and damages, in *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993). Concluding that the university was not fully and effectively accommodating the abilities and interests of female athletes, the district court granted a permanent injunction ordering reinstatement of the team. The Tenth Circuit Court of Appeals affirmed.

Actions by male plaintiffs have been less successful. In *Kelly v. Board of Trustees of Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994), the court concluded that the university's decision to terminate the men's swimming program while retaining the women's swimming program did not violate either Title IX or the Equal Protection Clause of the Fourteenth Amendment. Similarly, in *Gonyo v. Drake University*, 879 F. Supp. 1000 (S.D. Iowa 1995), the district court failed to find a Title IX violation when the university eliminated its men's wrestling program. The district court in *Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951 (D.R.I. 1991), found no Title IX violation when a boy was denied permission to play on the girls' field hockey team. Finally, although the district court concluded a school district violated Title IX by refusing to allow a boy to play on the girls' field hockey team, in *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3rd Cir. 1993), the Third Circuit reversed the grant of summary judgment for the plaintiff, concluding genuine issues of material fact were still in dispute.

Burden of Proof

In any case alleging a violation of Title IX, the ultimate burden lies with the plaintiffs to show that they have been excluded from participation in, or denied the benefits of an athletic program on the basis of sex.¹⁵ Proof of discriminatory intent is not required; disparate impact is sufficient to establish discrimination under Title IX.

In cases alleging a failure to fully and effectively accommodate the abilities and interests of students, the majority of courts have adopted the burden allocation first enunciated by the First Circuit in *Cohen*. Under the *Cohen* analysis, the plaintiffs must initially show a lack of substantial proportionality in the enrollment and athletic participation rates. If plaintiffs prove disparity, the school must then show that it has a history and continuing practice of program expansion responsive to the developing interests and abilities of members of the underrepresented sex. If the institution cannot show a history and continuing practice of program expansion, the burden then shifts back to the plaintiffs to show that the institution does not fully and effectively accommodate the interests and abilities of its women athletes. The types of evidence which may be used to show full and effective accommodation are discussed below at 5-8 and 5-9. (Note: Citation is to pages in original aricle. In this reprint, the pages are 73-74.)

Substantial Proportionality

The substantial proportionality prong of the test, often referred to as the "safe harbor," suggests compliance is achieved if the participation opportunities for male and female athletes are provided in numbers substantially proportionate to their respective enrollments. In other words, if 55% of an institution's students are female and 45% male, approximately 55% of the athletic participation opportunities should be for females; 45% for males. Because the measure is for participation opportunities, athletes who participate in more than one sport must be counted for each sport. Further, only actual participants, not potential participation slots, may be counted. However, those who practice with the team or are on the team roster generally may be counted even if they do not play in competition.¹⁷

The question of substantial proportionality has been addressed by the courts in several cases, most frequently resulting in findings of noncompliance. In *Roberts v. Colorado State University*, 814 F. Supp. 1507, *aff'd*, 998 F.2d 824 (10th cir. 1993), the court found that 10.5% disparity was not substantially proportionate, relying in part on earlier OCR findings that disparities of 7.5%, 12.5%, and 12.7% for the three years it reviewed did not show substantial proportionality. Furthermore, expert testimony indicated that a 10.5% disparity is statistically significant. Without demarcating more precisely the line between substantial proportionality and disproportionality, the Tenth Circuit agreed that a 10.5% disparity was not substantially proportionate. Similarly, in *Cohen v. Brown University*, 991 F.2d 888 (3rd Cir. 1993), and *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993), the courts concluded that disparities of 11.6% and 19% were insufficient to show substantial proportionality.

From the case law and the OCR guidance, it is clear that an institution need not spend ever-increasing resources on athletic programs to achieve substantial proportionality. Financially strapped institutions may comply with Title IX by cutting athletic programs so that

¹⁶ Only the New York district court in *Cook* has used the Title VII three step process for determining gender discrimination in allocating the burden of proof in a Title IX case. Because they found the issue moot, the Second Circuit did not consider burden of proof issues.

¹⁷ Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, United States Department of Education, Office for Civil Rights, January 16, 1996, p. 2-5.

men's and women's participation rates in athletics become substantially proportionate to their respective enrollments. However, unless the cuts result in certain compliance with substantial proportionality, including women's programs in the cuts will be risky.

In its most recent guidance, OCR refuses to draw a bright line percentage for establishing substantial proportionality. However, OCR does suggest that numbers will be deemed substantially proportionate when the additional number of opportunities needed to achieve proportionality would not be sufficient to sustain a viable team.¹⁸

A History of Continuing Expansion

If an institution cannot meet the substantial proportionality prong of the test, the institution may still be in compliance if it can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. A history of program expansion may include evidence of adding or upgrading of particular sports, of increasing the number of participants on particular teams, or of responding to requests from members of the underrepresented sex in these areas. Additions at fixed intervals are not required; the focus is on whether the expansion is demonstrably responsive to developing interests.

The courts have universally refused to find the dramatic expansion of opportunities for women that occurred in the 1970s sufficient to meet Title IX requirements. Instead, they have emphasized the need for evidence of continuing efforts to develop women's programs, and responsiveness to the flux of unserved interests and abilities. 19

In determining if expansion efforts are continuing, both the school's policies and procedures for requesting the addition of sports and the efforts of the school to monitor and be responsive to developing interests and abilities will be important. Failure to communicate the policy to students or failure to take timely action in response to student assessments or surveys will be detrimental to the school's ability to show continuing efforts.

Unlike substantial proportionality, compliance with the second prong of the test cannot be achieved through cuts in athletic programs which may affect teams of both sexes. The court in Roberts indicated that the ordinary meaning of the word "expansion" may not be twisted to find compliance under the history of continuing expansion prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs.²⁰ Unless part of a comprehensive plan of expansion which has already begun, promises of future expansion also will not be sufficient to show compliance with the second prong of the test.

Full and Effective Accommodation of Abilities and Interests

If an institution is unable to show substantial proportionality or a history of expansion, the institution may still be in compliance if it can show that the interests and abilities of members of the underrepresented sex have been fully and effectively accommodated through its athletic programs.

In this area, OCR will consider whether there is unmet interest in a particular sport, sufficient ability to sustain a team, and a reasonable expectation of competition in the league

¹⁸ Id. at 4-5.

¹⁹ In Roberts, the Tenth Circuit refused to read the words "continuing practice" out of this prong of the test, and concluded that the university did not meet its burden under this part of the test with proof of dramatic expansion of women's athletic opportunities during the 1970s. Further, the court found that participation opportunities for women had actually steadily declined during the 1980s. 998 F.2d at 830. See, also, Cohen, 991 F.2d at 903.

²⁰ Roberts, 998 F.2d at 830.

or geographical area in the sport if a team is created. If overall athletic opportunities for members of the underrepresented sex have been historically limited, however, the school may have an affirmative obligation to encourage competition opportunities.

On the issue of full and effective accommodation, courts have rejected the argument that an institution need only accommodate women's interests to the extent it accommodates men's interests, noting that the regulation requires full accommodation of the abilities and interests of the underrepresented sex. Thus meeting 85-90% of the interests of both males and females, and leaving 10-15% of female interests unmet will be insufficient under the third prong of the test. The courts have recognized that this is a high standard to meet. In *Cohen* the court stated:

(T)his benchmark sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interests and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.²¹

There is generally no protection for male athletes using this test, since it applies only to the underrepresented sex. Unless males are the underrepresented sex, it appears the failure of an athletic program to meet all of their abilities and interests will not result in a Title IX violation.

The OCR Policy Interpretation suggests schools have considerable latitude in choosing the methods for determining interests and abilities. Any process which takes into account the nationally increasing level of women's interests and abilities and is responsive to the expressed interests of students of the underrepresented sex who are capable of competition may be used. In determining interest and ability, the methods used cannot disadvantage members of the underrepresented sex, and must take into account team performance records. Suggested methods include a survey or poll assessing interests and abilities of the student body; a review of intramural and club programs; a review of sports programs at "feeder schools"; a review of community recreation and regional sports programs; and a review of sports being played in physical education classes.

Courts have relied on a variety of evidence to show institutional failure to fully and effectively accommodate interests and abilities. In situations where a competitive women's team has been eliminated or demoted, the mere existence of the team appears to be sufficient to show unmet needs and unaccommodated interests. In *Roberts* evidence relied upon by the court included plaintiffs' testimony about their commitment to softball, the recognition they had achieved as a team and as individuals, and the competitive schedule they had prior to the time the team was eliminated. Testimony also indicated that softball was increasing in popularity among high school students, and that there was substantial interest among first year students who were participating in a club team.²²

When plaintiffs are seeking to have a new team created, the type of evidence necessary to show unmet need is less clear. In *Cook* the lower court considered the following evidence relevant: the fervor and persistence of club members who petitioned four times for elevation from club to varsity status; the fact that 30-40 women participated in the club each year; the fact that ice hockey was a sport played in prep schools in the area; the fact that the club had played varsity teams as part of its schedule; and testimony from a coach from another program that the team would evolve into a competitive team over time with proper resources. The court rejected the testimony of the college's own coaches who testified that the women

²¹ Cohen, 991 F.2d at 898.

²² Roberts v. Colorado State University, 814 F. Supp. 1507, 1517-18 (D. Colo. 1993).

could not compete at the varsity level, but admitted that they had never watched the women play.²³

Costs and Consequences

For institutions involved in Title IX litigation, the consequences can be costly. Several cases have resulted in awards of monetary damages or settlement agreements that included monetary compensation. Additionally, prevailing plaintiffs in Title IX actions may be awarded their attorney's fees. In addition to these costs, mandated creation or continuation of an athletic program, including adequate funding of that program, is a common judicial remedy.

The court in *Roberts* went even further, delving into actual control of the athletic program. The Tenth Circuit specifically held the district court did not abuse its discretion by prescribing the manner in which the university was required to comply with Title IX by providing plaintiffs with individual relief. In addition to requiring that the softball program be reinstated, the court ordered the university to hire a softball coach, to prepare a field for the team's use, and to provide equipment and uniforms. It further ordered the university to recruit members for the team and to play a fall exhibition season. The Tenth Circuit found all but the last of these remedies within the court's authority. The appellate court suggested that while the district court had authority to reinstate the program with all the benefits of varsity status, it did not have authority to make sure the team had a good season.²⁴

The Tenth Circuit indicated that the university could seek to have the injunction dissolved when the individual plaintiffs had graduated or left the university. Alternatively, the court indicated that the university could make efforts to meet the first two benchmarks of the test, in which case it would no longer be required to maintain a softball team.²⁵

Equal Protection Claims

In addition to claims of discrimination under Title IX, challenges alleging sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment in sports programs are often brought against schools. Some courts have considered these claims along with the Title IX claims; other courts have concluded that Title IX provides the exclusive remedy, precluding allegations of constitutional violations under 42 U.S.C. ss. 1983.²⁶ Those courts considering equal protection claims have agreed that the intermediate level of scrutiny, requiring that governmental action or regulation be substantially related to important governmental interests, should be applied in these cases.

Violations of state constitutions or state equal rights amendments may also be asserted in cases alleging gender discrimination in athletic programs. These state provisions may provide more protection for plaintiffs than federal constitutional provisions, particularly if a higher level of scrutiny is required.²⁷

In *Haffer v. Temple University*, 678 F. Supp. 517 (E.D. Pa. 1987), a class action alleging gender discrimination in Temple's intercollegiate athletic programs, plaintiffs originally brought Title IX claims, but were granted leave by the court to file an amended complaint to include

²³ Cook, 802 F. Supp. at 745-51.

²⁴ Roberts, 998 F.2d at 834-45.

²⁵ *Roberts*, 998 F.2d at 833-34.

²⁶ Williams, 998 F.2d at 176.

²⁷ State equal rights amendment claims were asserted in *Williams*, and formed the basis for the action in *Blair v. Washington State University*, 740 P.2d 1379 (Wash. 1987). Additionally, in *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 378 Mass. 342, 393 N.E.2d 284 (1979), the Massachusetts court concluded the state's Equal Rights Amendment required strict scrutiny analysis.

federal and state constitutional claims after the Supreme Court decision in *Grove City.*²⁸ Plaintiffs alleged discrimination in opportunities to compete, distribution of resources, and allocation of financial aid, and survived a motion for summary judgment on almost all of the issues raised.

In the 1970s several cases challenged school district or state rules or regulations which prohibited girls from participating in specific high school sports. Although Title IX does not require that members of the opposite sex be allowed to play on a single sex team if the sport involved is a contact sport, the same exemption is not recognized in the constitutional arena. In general, most courts have concluded such regulations deny girls equal protection of the law.²⁹ At the same time, courts have generally upheld regulations which prohibit boys from participating on girls' teams, concluding that such regulations are substantially related to the important governmental interests of promoting equality of athletic opportunities and redressing past discrimination against females in athletics.³⁰

Responding to Recent Developments

Given these recent developments in the Title IX arena, school districts are well advised to review their current status with regard to Title IX compliance. School boards should consider the following actions:

- Bring the district's Title IX Self Evaluation Study up to date.
- Train appropriate personnel about Title IX requirements in the athletic arena.
- Assess the school's athletic programs and level of participation in the program. Know by numbers what has happened in the past and is happening currently.
- Review current procedures for evaluating and acting on requests for new athletic programs. If no procedures exist, adopt procedures which are reasonable and fair.
- Make available to students information on how to make requests.
- If there is a lack of proportionality and no evidence of continuing program expansion for members of the underrepresented sex, do not cut or downgrade girls' teams or add boys' teams until all Title IX implications are considered.

²⁸ The federal district court and the Third Circuit Court of Appeals had both concluded that Temple's athletic programs were subject to Title IX, notwithstanding the fact that the athletic department did not directly benefit from earmarked federal dollars. *See Haffer v. Temple*, 524 F. Supp. 531, *aff'd*, 688 F.2d 14 (3rd Cir. 1982). However, in *Grove City* the Supreme Court concluded Title IX applied only to programs which specifically benefited from federal dollars. In light of that opinion the district court ordered the plaintiffs to strike their Title IX claims, except those claims dealing with scholarships, but allowed the amendment of the complaint to include federal and state constitutional claims.

²⁹ See Morris v. Michigan State Board of Education, 472 F.2d 1207 (6th Cir. 1973) (striking a regulation prohibiting girls from participating on the tennis team); Brenden v. Independent School Dist, 477 F.2d 1292 (8th Cir. 1973) (striking regulations barring girls from competing against boys in tennis, cross country skiing and cross country running); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (striking regulation prohibiting mixed sex competition in football and other sports); Force v. Pierce City R-VI School Dist, 570 F. Supp. 1020 (W.D. Mo. 1983) (striking a rule prohibiting girls from trying out for football); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (striking a regulation which prohibited girls from participating on any boys' teams); Hoover v. Meikeljohn, 430 F. Supp. 164 (D. Colo. 1977) (striking a regulation prohibiting girls from participating in high school soccer); Carnes v. Tennessee Secondary School Athletics Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (granting a preliminary injunction to enjoin enforcement of a rule prohibiting girls from playing on a baseball team); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (granting a temporary restraining order against enforcement of a rule prohibiting girls from playing football); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973) (striking a regulation barring female participation in boys' cross country).

³⁰ See Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); Mularadelis v. Haldane Central School Board, 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980); Petrie v. Illinois High School Athletic Ass'n, 75 Ill. App. 3d 980, 31 Ill. Dec. 653, 394 N.E.2d 855 (1979).

- If there is a lack of proportionality and no evidence of continuing program expansion for members of the underrepresented sex, consider reducing the number of male participants or increasing the opportunities for female participation in the district's athletic program.
- Be aware that lack of funds will not excuse failure to comply with Title IX if the program is challenged.